United States Senate

WASHINGTON, DC 20510

March 10, 2015

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Dear Administrator McCarthy:

EPA's recently proposed National Ambient Air Quality Standard (NAAQS) for ozone will likely be the costliest rule the Agency has ever proposed. The November 2014 draft Regulatory Impact Analysis ("draft RIA") estimates that the cost of lowering the standard could range from $3.9 billion to almost $39 billion in 2025 ($2011 dollars) depending on the standard and the assumptions used.[1] While these numbers are high, there are significant reasons to believe that the draft RIA may underestimate the likely true cost to the American public due to a number of questionable assumptions included in the analysis.

Inflated Baseline Controls: EPA's draft RIA estimates only the incremental costs of reducing emissions above a "baseline" level of controls. One way to lower the projected incremental costs is to assume more controls are imposed in the baseline. For instance, EPA assumes in the baseline that the existing ozone standard will be fully implemented, despite the fact that over 225 counties have yet to meet the existing standard. EPA also makes a number of misleading assumptions that other regulations and proposals will be fully implemented, such as CAFE, Tier 3, and the existing source proposal for electric utility generating units ("Clean Power Plan"), greatly underestimating the true cost of compliance with this proposal.

California costs are also calculated separately, further underestimating the true potential cost of compliance of a lowered NAAQS. The draft RIA estimates the annual cost to California alone would be between $800 million and $2.2 billion.[2] Clearly, the rule's estimate of projected costs ignores the very substantial burden the American public has yet to shoulder to meet the existing standard.

Arbitrarily Capping Known Control Costs to $14,000/ton for NOx and $15,000/ton for VOC's. (p7-4 of draft RIA): EPA also lowers compliance costs by arbitrarily assuming that costs for known controls are capped.[3] Private sector analyses, however, show that EPA is ignoring expensive and politically unpalatable known measures, such as early retirement of stationary sources and replacement of higher emitting mobile sources.

---

[1] *Regulatory Impact Analysis of the Proposed Revisions the National Ambient Air Quality Standards for Ground-Level Ozone ("RIA")*, November 2014, at 7A-7 to 7A-8

[2] *Id.* at ES-18

[3] *Id.* at 7-4

Focusing on only 2025: While a snapshot of the annualized costs in the year 2025 is illustrative, it does not provide the public with a full understanding of the likely costs of the program and when these costs might peak. Nonattainment designations will be made in 2017 and will be based on nearly-current air quality conditions (i.e., ozone levels in the years 2014-2016). As a result, many more counties will likely be designated as nonattainment in 2017 than the nine counties identified by EPA as still being in nonattainment in 2025. For example at 70 ppb, the high end of EPA's proposed range, approximately 350 counties would violate the lower standard based on current ozone levels.[4] Many of these counties and the surrounding areas will be forced to initiate expensive local source control programs before 2025, even though EPA estimates only 9 counties will still fail the 70 ppb standard by 2025. This suggests that the costs estimated based only on 2025 conditions will omit costs and, in particular, will omit costs that will occur in earlier years. We believe it would be useful for the public to see the projected costs and benefits in other years as well as the net present value costs of the full program.

Underestimating the cost of unknown controls: One of the most important assumptions used by EPA is the Agency's estimate for the cost of "unknown" controls. At 70 ppb, over 60 percent of the total costs of the program are based on the costs of unknown controls. At 65 ppb, this number jumps to roughly 75 percent of the estimated total costs of the program.[5] Any assumption regarding the costs of unknown controls will clearly dominate the estimate of total and annualized costs, and yet this is the most uncertain value in EPA's cost analysis.

As in past RIAs, EPA makes the assumption that innovative strategies and new control options not known today will appear in the near future. The problems with this fundamental assumption should not be overlooked. Many counties in California, Texas, and New England have failed to meet the existing standards, despite decades of struggle. The fact these technologies are not yet known given strong incentives dating back to the 1970s raises important questions regarding whether and how quickly these controls will be developed.

EPA's draft RIA not only assumes the technologies will quickly develop, but that they will cost no more on average than the costs of the more expensive emission controls being employed today. This is at odds with EPA's final RIA for the 2008 ozone standard review where EPA evaluated unknown controls using both fixed cost assumptions and a hybrid cost assumption that allowed for gradual increases in costs overtime in line with standard marginal cost data. Unsurprisingly, the hybrid assumption yields higher cost estimates. In the new draft RIA, EPA has dropped the hybrid cost analysis altogether, further lowering its cost estimates.

Ignoring Inflation: EPA also lowers its fixed cost estimates for unknown controls in its new draft RIA (compared to the 2008 RIA) by assuming the same fixed cost estimates for unknown controls but in $2011 dollars rather than $2006 dollars. This sleight of hand lowers the assumed fixed costs by another 10 percent or more.

---

[4] EPA fact sheet, Ozone By the Numbers, at 2
[5] *RIA* at 7A-7 and 7A-8

Ignoring Market Prices: As EPA lowers the standard, more areas in the country, including many in the Northeast and Southeast, will have to adopt California-level controls before facing the uncertainty of unknown controls. Emission trading markets in California and Texas give us a market-based projection of how expensive these controls might actually be. For Houston, the 2013 annualized offset prices for nitrogen oxide (NOx) emissions, a precursor for ozone, was $97,000 per year. In the California South Coast, annualized offset prices for NOx have averaged over $106,000.[6]

The American public should be skeptical of EPA's cost estimates. In contrast to the 2008 RIA, EPA's draft 2014 RIA fails to show through whole economy modeling how these costs will be distributed through the economy and what the economic impact of the costs will be. The American public deserves to know more, and we plan to seek answers to these important questions in the days ahead.

Sincerely,

James M. Inhofe
Chairman
Environment and Public Works

David Vitter
United States Senator

Shelley Moore Capito
United States Senator

Mike Crapo
United States Senator

John Boozman
United States Senator

Jeff Sessions
United States Senator

Roger Wicker
United States Senator

Deb Fischer
United States Senator

[6] *RIA* at 7-24.

Mike Rounds
United States Senator

Dan Sullivan
United States Senator

John Thune
United States Senator

John Barrasso
United States Senator

Environment and Public Works Committee Hearing
"Oversight Hearing: Examining EPA's proposed carbon dioxide emissions rule from new, modified, and existing power plants."
February 11, 2015
Follow-Up Questions for Written Submission to Administrator Janet McCabe

Chairman Senator Inhofe:

1. In 2013, four nuclear reactors prematurely closed. One of those reactors was the Kewaunee plant in Wisconsin. When EPA set the reduction target for Wisconsin, it did so based on electricity production in 2012, a year in which Kewaunee was still operating.

    a. This means Wisconsin will be forced to meet a more stringent target, correct?

2. There are currently five nuclear reactors under construction, in Georgia, South Carolina and Tennessee. Since they are under construction, they clearly did NOT produce electricity in 2012. However, the Congressional Research Service[1] found that EPA's plan "substantially lowers" the targets in those states to account for their investments in nuclear power, making their targets more stringent and harder to achieve.

    a. Did EPA similarly penalize states with wind projects under construction, assuming *their* existence in setting targets for those states, making those states' targets harder to achieve?

    b. Why does nuclear energy receive such arbitrary treatment?

    c. Shouldn't EPA treat hydropower, nuclear power, and other sources of zero-emission electricity the same?

    d. If states rely upon new reactors in their State Implementation Plans under the proposed rule, will EPA penalize the states if the NRC refuses to allow those reactors to begin operating?

3. Economic modeling of climate legislation by EPA, EIA, and others has consistently shown that dramatic growth in nuclear energy is necessary to reduce carbon emissions and that constrained development of nuclear energy dramatically increases the costs of compliance. In fact, in 2008, EPA determined that 44 new reactors would be needed by 2025 to satisfy the requirements of S. 2191, known as the Lieberman-Warner bill. In 2009, EIA determined that

[1] CRS, STATE CO2 EMISSION RATE GOALS IN EPA'S PROPOSED RULE FOR EXISTING POWER PLANTS, 14 (July 21, 2014).

96 gigawatts of new nuclear capacity would be needed by 2030 under HR 2454, the Waxman-Markey bill.

a. How many new reactor licenses are actively being reviewed by the NRC?

b. How many new reactors, in addition to those currently under construction, are necessary to enable compliance under EPA's base case for the proposed rule?

c. How does EPA plan to meet its carbon emission reductions *without* increasing the use of nuclear energy or even replacing the units that currently provide the bulk of our carbon-free electricity?

4. For states that do not submit a state implementation plan, what mechanisms of enforcement will the EPA rely to impose a federal plan under the Clean Power Plan proposal? Please provide the statutory cite by which EPA will rely for each enforcement mechanism. Will EPA depend on 3rd party environmental groups to file suits against the states to push enforcement? Would EPA make compliance with the Clean Air Act a requisite for federal permits? If so, what permits?

5. In response to a question from Sen. Wicker about stranded assets, Acting Assistant Administrator McCabe testified that EPA is being careful "not to put plants in a position of stranding assets." Please explain what specific steps EPA has proposed -- or is contemplating -- to avoid stranding assets and investments existing facilities have made to comply with Clean Air Act and other environmental requirements.

6. Acting Assistant Administrator McCabe also testified that EPA is working with state regulators to see whether there is flexibility "to provide a path" for avoiding stranding assets. Please identify which states you are working with on this issue, and describe the "potential paths" being discussed.

7. Please provide a detailed explanation of the flexibility afforded to states by the Clean Air Act and EPA's 111(d) implementing regulations (40 C.F.R. part 60, subpart B) to grant variances to specific facilities allowing for different emission standards and longer compliance periods without increasing the burden on other facilities within the state.

8. Please identify with specificity the factors, other than plant age, location, design, or remaining useful life, that states may consider under 40 C.F.R. 60.24(f)(3) in determining when a less stringent standard or final compliance time is "significantly more reasonable." Would the fact that a plant recently made significant capital expenditures to install pollution controls to comply with Clean Air Act programs qualify for relief under 40 C.F.R. 60.24(f)(3)? If so, under what circumstance? If not, why not?

9. In the preamble to the proposed Clean Power Plan, EPA states that "the flexibility provided in the state plan development process adequately allows for consideration of the remaining useful life of the affected facilities and other source-specific factors and, therefore, that separate application of the remaining useful life provision by states is unnecessary." In other words, EPA appears to be saying that because EPA has provided flexibility in state plans, states are prohibited from further consideration of remaining useful lives and other factors for facilities within their state. Please explain with specificity EPA's legal authority for limiting state flexibility in this way, including why such a restriction is not inconsistent with Clean Air Act section 111(d)(1), which provides that EPA "regulations . . . *shall permit* the State in applying a standard of performance . . . to take into consideration , among other factors, the remaining useful life of the existing source." (Emphasis added).

10. EPA further provides in the preamble to the proposed rule that, 'to the extent that a performance standard that a state may wish to adopt for affected EGUs raises facility-specific issues, the state is free to make adjustments to a particular facility's requirements on facility-specific grounds, so long as any such adjustments are reflected (along with any necessary compensating emission reductions) as part of the state's CAA section 111(d) plan submission." Please explain with specificity EPA's legal authority for conditioning states' variance authority in this way. Also, please explain how such a restriction is not inconsistent with CAA section 111(d) and would not restrict a state's flexibility to avoid stranding assets.

Senator Booker:

1. Nuclear power plants currently provide 60 percent of the nation's emissions-free power generation, and are especially important in states like New Jersey. Many of these existing power plants are under market pressures that could lead them to be replaced with emitting generation. The Clean Power Plan proposal attempts to address existing nuclear power by factoring six percent of emissions-free nuclear generation into each state's target. In most states, including New Jersey, this provides a negligible incentive to avoid replacing this generation with gas.
    a. What changes are the EPA exploring to ensure the Clean Power Plan strongly encourages states to maintain nuclear generation as a critical resource?

2. After the Clean Power Plan is finalized this year, states will be able to comply with it by designing state-specific plans that are responsive to state and local needs.
    a. As states design their implementation plans, what flexibility will they have to support existing nuclear power beyond any mechanisms or crediting specifically included in the proposed rule?
    b. Will there be ways states can specifically encourage nuclear units to operate beyond their initial licensing periods, to the extent units can do so safely?

3. I have heard concerns about unintended consequences that could arise from the Clean Power Plan as proposed. Specifically, the dramatic early reduction requirements proposed in the rule may render several coal plants uneconomic, and therefore encourage states to turn to the rapid deployment of new natural gas combined cycle generation to satisfy their energy

needs. Large amounts of new natural gas power plants have the potential to disincentivize construction of renewable and other clean energy technology for decades because states can comply with the Plan from the reduced carbon emissions from natural gas power plants. This has the potential to tilt the playing field in the power sector towards new natural gas fired power plant at the expense of renewable energy.

a. Can the EPA avoid the potential prioritization of power from natural gas power plants and encourage states to adopt renewable and clean energy technology?
b. Can you please provide me with an update on some of the modifications EPA is considering to ensure that the final Plan incentivizes the use of renewables to the maximum extent possible?

4. Minority communities, including communities of color, are disproportionately affected by pollution. With President Clinton's 1994 Executive Order 12898, and President Obama's continued support for that executive order, the environmental justice movement has grown in the past couple of decades. The EPA, with the Clean Power Plan, has a unique platform to tackle issues of environmental justice and equity.
   a. Is the EPA contemplating requiring states to consider the environmental justice impacts of their state implementation plans in order to comply with the Clean Power Plan?
   b. If not, why not?
   c. If so, will the EPA offer states guidance on ways to measure compliance for the environmental justice impacts of states' implementation plans?

Senator Fischer:

BUILDING BLOCK 1 (COAL PLANT EFFICIENCY)

- During our discussion at the hearing regarding Building Block 1 and the achievable heat rate improvements at coal-fired plants, you stated that EPA's assumption in going into the proposal "was not that every single source would be able to achieve exactly the amount of reductions [you] identified in each building block...[you] believed that some can do ***more*** in one area and some may choose to do less in other areas." In Nebraska, there are no coal-fired power plants that are capable of achieving a heat rate improvement of 6%. Did EPA receive public comment from any utilities or state departments of environmental quality that identified any plant of being able to achieve this rate improvement? Or a rate that is ***more*** than the target identified by EPA?

- Do you acknowledge that EPA misused the Sargent & Lundy study in setting the heat rate improvement goals for Building Block 1?

- Installation of additional pollution control equipment will degrade a unit's heat rate performance. Given that regulations such as MATS and Regional Haze are driving the installation of more control equipment on coal-fired units, what type of adjustments will be made in the rule to account for such EPA-driven degradations?

BUILDING BLOCK 2 (NATURAL GAS CC UTILIZATION)

- Nebraska DEQ stated in its public comments that a 70% utilization rate at natural gas plants is neither sustainable, nor achievable. Nebraska does not have adequate natural gas supplies or pipeline infrastructure to sustain a 70% utilization rate of existing natural gas combined-cycle plants, particularly during colder months.[2] FERC memos indicate that last April, FERC's Office of Electric Reliability told EPA that its assumptions in building block 2 overestimated natural gas combined cycle capacity factors and that FERC "had doubts about the ability to expand the pipeline infrastructure as quickly as the emission targets implied."[3] Why didn't EPA go back and fix those assumptions based on FERC's feedback?

BUILDING BLOCK 3 (RENEWABLES)

- The Nebraska Department of Environmental Quality thinks that its "disingenuous" to require states to undertake measures that the EPA itself may not have the authority to implement. What authority does EPA or the Nebraska DEQ have to mandate renewables?

INTERIM TARGETS

- In December, I led a group of 23 Republican Senators in writing to EPA regarding key concerns with the proposed Clean Power Plan. Senator McCaskill led a parallel letter that was sent by a group of Democrat Senators raising the same concerns, including the unrealistic interim targets (known as the "2020 cliff"). The consequences of these front-loaded targets have been echoed by many stakeholders. Will you commit to removing these interim targets?

RFS

1) As you know, renewable fuels like ethanol and biodiesel are an important economic driver in my state. Unfortunately, the EPA has yet to release their yearly volumes for both 2014 and 2015. When do you plan to release this rule? Will it no longer contain methodology that artificially limits the market access of biofuels producers?

Senator Sessions:

1) In your written testimony, you state that if climate change is left unchecked, it will have "devastating impacts on the United States and the planet." You write further that "the costs of inaction are clear. We must act. That's why President Obama laid out a Climate Action Plan."

---

[2] Nebraska Department of Environmental Quality Comments on Clean Power Plan, Docket ID: EPA-HQ-OAR-2013-0602, page 4.

[3] Memo from Mike Bardee, FERC, re: Phone call on EPA's draft rule for GHG from existing power plants, made available to Congressman Whitfield as a response to Questions for the Record from FERC Chairman Cheryl LaFleur.

a. Does the United States Constitution authorize the executive branch to act unilaterally and impose regulatory mandates due to "inaction," or the absence of a valid authorization from Congress?

b. Bjorn Lomborg—who testified before the Clean Air and Nuclear Safety Subcommittee last Congress—wrote in the *Wall Street Journal* earlier this month about studies which have showed that in recent years, there have been fewer droughts, decreased hurricane damage, and a rise in temperatures that is 90% less than what many climate models had predicted. Mr. Lomborg's July 2014 testimony to the Subcommittee also indicated that the cost of climate "inaction" by the end of the century is equivalent to an annual loss of GDP growth on the order of 0.02%.

   Given that recent temperature rises have been significantly less than what many climate models predicted, does it remain EPA's position that climate "inaction" will have "devastating impacts on the United States and the planet"? Does the agency agree or disagree with Mr. Lomborg's testimony regarding the minimal loss of GDP growth due to climate "inaction"? Please provide all information, data, and studies used to support EPA's conclusion.

c. You are advocating dramatic action at great cost to the American people to avert "devastating impacts" of global warming. Before such costs are imposed on the people, it is essential that you lay out in detail the "devastating impacts on the United States" that EPA anticipates due to climate inaction. Please provide in detail these impacts as well as a timeline for when these impacts are expected to occur.

d. If the latest and best available science demonstrates that the climate impacts projected by EPA are not occurring, or are less than anticipated, would the agency be willing to reconsider its climate action policy?

2) EPA's Clean Power Plan is based in part on a "building block" which assumes states will achieve a 1.5% annual increase in demand-side energy efficiency.

a. Please provide the provisions in the United States Constitution and Clean Air Act which authorize EPA to base its Clean Power Plan on *consumers* increasing their energy efficiency. How does EPA intend to implement this particular "building block"?

b. Please provide the peer-reviewed or technical studies which EPA used to establish the "building block" for a 1.5% annual increase in demand-side efficiency.

c. To what extent did EPA account for population growth in establishing a "building block" whose purpose is to reduce aggregate demand on power plants?

3) EPA claims that the Clean Power Plan's "timing flexibility" will allow municipally owned utilities and some electric cooperatives to "use both short-term dispatch strategies and longer-term capacity planning strategies to reduce GHG emissions." However, these providers often purchase power from dedicated units, sometimes crossing state lines, on long-term contracts. Long-term contracts in many circumstances yield the most reliable pricing. How does EPA reconcile the interim goals contained in the Clean Power Plan with the need of municipally owned utilities and some electric cooperatives to enter into long-term contracts in order to provide reliable pricing for their customers?

4) During a recent taxpayer-funded trip to the Vatican, Administrator McCarthy indicated that it is important to look after the well-being of persons living in poverty. What has EPA done to evaluate the adverse wage and employment impacts that have fallen on middle-class workers?

5) In recent years, the U.S. Army Corps of Engineers has proposed operational changes that would diminish the amount of hydropower available to communities in Alabama. Please explain how EPA's proposed carbon dioxide emissions rules account for Army Corps decisions which may adversely affect the ability of Alabama communities to rely on hydropower as a low-carbon source of energy.

6) President Obama has stated that "we need to increase our supply of nuclear power," and that we should be "building a new generation of safe, clean nuclear power plants in this country." How many <u>new</u> reactors, in addition to those currently under construction, are necessary to enable compliance under EPA's base case for the proposed rule?

7) In its 2012 decision remanding the Nuclear Regulatory Commission's Waste Confidence rule, the DC Circuit Court observed:

> *"At this time, there is not even a prospective site for a repository, let alone progress toward the actual construction of one... The lack of progress on a permanent repository has caused considerable uncertainty regarding the environmental effects of temporary [spent nuclear fuel] storage and the reasonableness of continuing to license and relicense nuclear reactors."*

The Administration's actions to shut down the Yucca Mountain program caused a federal court to question the reasonableness of licensing nuclear plants, triggering a two-year licensing moratorium at the NRC. The NRC has since revised its rule, which has once again been challenged by the NRDC, a proponent of the Clean Power Plan.

Given that nuclear energy generates nearly two-thirds of our nation's carbon-free electricity, how does EPA envision achieving carbon reductions if our largest source of carbon-free electricity is threatened based on the Administration's decision to illegally abandon the Yucca Mountain project?

Senator Sullivan:

1) Has the EPA conducted any analysis specific to Alaska that proves the Proposed Rule on existing plants can be reasonably implemented and would not impair electricity reliability in Alaska? Do you have modelling or cost information specific to Alaska? Do you have any analysis specific to Interior Alaska? Please provide all relevant data.

2) How much flexibility is the EPA prepared to provide states if efficiency upgrades to power plants, building new generation sources, new or upgraded transmission lines or new natural gas pipelines are slowed down or stopped because of environmental reviews or litigation?

3) Alaska's grid is quite limited, and most of our utilities are not interconnected. Also, Alaska is islanded, as we are not connected to the North American power grid. Does the Proposed Rule for existing plants contemplate this scenario?

4) Alaska has a single transmission line north and south of Anchorage with limited transference capacity. One of the presumptions of EPAs "building blocks" is the notion that more efficient combined-cycle gas generation can be substituted for coal-fired generation. Will there be exceptions made for states where the grid does not allow the transfer of sufficient quantities of energy to replace local coal-fired generation?

5) Currently, natural gas powered electricity generation is not available in Interior Alaska, and due to geographical challenges,, natural gas may not be an economical option for electricity generation in the near future. How much flexibility is EPA prepared to provide based on geographic challenges such as those faced in Interior Alaska?

6) EPA's Legal Memorandum accompanying the Proposed Rule for existing plants states, "Central to our Best System of Emission Reduction (BSER) determination is the fact that the nation's electricity needs are being met, and have for many decades been met, through a grid formed by a network connecting groups of Electric Generating Units (EGUs) with each other and, ultimately, with the end users of electricity... Through the interconnected grid, fungible products—electricity and electricity services—are produced and delivered by a diverse group of EGUs operating in a coordinated fashion in response to end users' demand for electricity." How does this rationale apply to Alaska? Please explain.

7) What consultation occurred with states during the rulemaking process? Were any State of Alaska officials involved in the drafting of the proposed rules?

8) Do you think the resources that will be spent in Alaska complying with the Proposed Rule on existing plants could be better spent helping our bush communities move away from expensive diesel generation and towards more cleaner and inexpensive options?

9) Fairbanks is reliant on coal fired power. A recent University of Alaska study determined that coal fired technology is the only viable affordable option for Interior Alaska's electric generation. Fairbanks is also in a PM 2.5 nonattainment area. If our Interior coal plants shut down, or the rates increase even higher than they are already, more Fairbanks residents will begin heating their homes with wood stoves and further aggravate the PM 2.5 issue. Have you given any thought to how the EPA will help mitigate the social and economic impacts on communities if these rules are finalized? Has the EPA conducted any analysis on unrelated consequences of this Proposed Rule on existing plants, such as the PM2.5 issue?

Senator Vitter

Focusing on NRDC Relationship with EPA

Under the Clean Air Act §307(d), EPA is required to post all written comments and documentary information received in the docket, including information obtained through emails, phone calls, and meetings with Agency officials. Documents obtained by the Committee pursuant to a request for communications regarding the ESPS and NSPS rules between EPA and NRDC reveal a significant amount of correspondence that EPA did not post to the rulemaking docket. While the requirement does grant the Agency discretion over what information is material to the rule, the fact more than a dozen phone calls and meetings on the rules were excluded from the docket raises questions over EPA's level of transparency in developing the rules.

1. Ms. McCabe, as you are aware, I submitted requests for documents on these rules last Congress. While I understand the Agency is still producing documents to the Committee, a review of those in the Committee's possession reveal a pattern of frequent meetings and phone calls between EPA and NRDC. Not only am I concerned by the increased access NRDC had to EPA officials developing these rules, but there is a real concern over a number of meetings and calls that EPA did not include in the rulemaking docket. Ms. McCabe, are you aware of such correspondence not being posted to the docket? Why do you think some correspondence with NRDC over others was excluded from the docket? Will you commit to correcting the docket?

2. In one of the emails you released last fall as part of your investigation into EPA's relationship with NRDC. One email in particular is important given the fact that many states are just going to refuse to implement a rule they view as illegal and an inappropriate usurpation of power.

ESPS requires states to submit a state implementation plan (SIP) for EPA's approval, which demonstrates how the state will meet emission goals. Under 111(d), EPA has the authority to issue a federal implementation plan (FIP) for states that do not submit a SIP or submit an unsatisfactory SIP. While the EPA has said ESPS encourages state flexibility in developing SIPs, evidence suggests EPA is being disingenuous and is inclined to issue a backstop FIP. An

email obtained by the Committee reveals that the idea of a federal takeover of states through ESPS FIPs may have come from the NRDC. In the email, NRDC attorney Dave Hawkins advises senior EPA air official Joe Goffman how EPA can tamper with state compliance dates and issue backstop FIPs.

3. Ms. McCabe, documents obtained by the Committee suggests that NRDC helped develop the Agency's strategy for issuing a model FIP to circumvent state implementation challenges. [SHOW POSTER] Specifically, in June 2013—before the rule was proposed—NRDC attorney Dave Hawkins advised senior EPA air official Joe Goffman, "as long as the compliance date for the FIP 111(d) emission limits is a few years after the SIP submission deadline, it appears that EPA can promulgate backstop FIP limits even in advance of the June 2016 SIP submission date." Why was NRDC providing such detailed advice to EPA before the rule was even proposed? Prior to the email, had EPA considered issuing a model FIP? Did NRDC's advice have any bearing on the model FIP EPA is currently developing? Is EPA in fact planning to issue its model FIP before the SIP deadline?

4. Ms. McCabe, I think EPA is delusional if the agency believes there isn't going to be a serious problem with a number of states refusing to implement the ESPS and put forward a state implementation plan. Has EPA begun developing a litigation strategy with NRDC to force compliance or otherwise enter into settlement agreements? And has NRDC, which is perhaps America's largest environmental law firm, discussed options for NRDC to help pay for energy price increases. In other words, NRDC is worth hundreds of millions of dollars, if they're so comfortable increasing energy prices on America's poor and elderly have they discussed with you options for using some of their endowment to help the consumers they plan on hurting

Social Cost of Carbon

EPA's regulatory impact analysis for ESPS is primarily based on climate benefits derived from the convoluted 2013 social cost of carbon (SCC) estimates, as well as of course the PM benefits that EPA's now infamous fake CIA agent John Beale worked on. You have made several requests, along with other members of Congress, for information on the Interagency Working Group (IWG) that developed the estimates. None of the Administration's responses have been fully responsive to such requests. There is still zero transparency over who participated and the extent of their participation.

1. Ms. McCabe, you may recall I previously asked whether or not you participated in the Interagency Working Group developing the social cost of carbon (SCC) estimates, and I know at that time your answer was no. I also know that despite Congressional requests for information, the SCC remains stuck in a black box. There is still zero transparency. And since we last spoke on this topic, the EPA proposed the ESPS—one of the most expansive and expensive regulations—which relies on climate benefits from the flawed and secretive SCC. That said, what was your role in developing the cost-benefit analysis for ESPS which relied on the SCC? Have you had any interaction with the SCC Interagency Working Group? Why have you not provided my office with the

names and titles of those officials under your supervision in the Office of Air Radiation that have participated in the Interagency Working Group?

Technical Questions

1. In his Presidential Memorandum directing the Agency to undergo this rulemaking process, President Obama explicitly directs EPA to take "into account other relevant environmental regulations and policies that affect the power sector" and to "tailor regulations and guidelines to reduce costs". In the event that a coal-fired power plant has invested hundreds of millions of dollars to comply with EPA rules such as the Mercury Air Toxics Standard and the Cross State Air Pollution Rule, how does EPA's Clean Power Plan ensure that such an entity will be able to meet its financial obligations due to these investments?

2. Beyond achieving a certain level of efficiency gains, there are no commercially available technologies to reduce CO2 emissions from coal-fired power plants. According to EPA's regulatory impact analysis, the Clean Power Plan will increase electricity rates. For certain coal plants operating in organized electricity markets, this increased cost is likely to reduce plant production to the extent that alternative lower emitting sources of production are less expensive and hence will operate at higher utilization rates. Thus, the financial impact on the generating unit will be a combination of lower revenues associated with lower production and lower earnings associated with higher costs not being offset by higher sales revenues. As CO_2 emission standard compliance costs increase, reductions in production will increase.

   These increased costs will lead to different outcomes for certain coal-dominated entities, including rural electric cooperatives, municipals, and merchant power producers. Higher electricity costs will be either (1) borne directly by ratepayers, in the case of a cooperative or municipal; or (2) result in decreased financial operating margins, in the case of a generator dependent solely on the wholesale market for revenues. Do you agree with these conclusions? If not, please explain why. Please further explain how EPA plans to address these disproportionate impacts, and how a state in a SIP would be allowed to deal with them.

European Disaster Question

1. Fortunately last congress we had some really great witnesses that were able to testify on the state of climate science, and the fact that our climate always has been and always will be changing, as well as to the impacts policies similar to what EPA is trying to implement have had on the citizens and economies of European countries that have adopted similar requirements. Can you provide for me your thoughts on how Germany, Spain, France and the U.K. have benefited from their global warming polices and energy mandates? Specifically, can you walk me through how the changes in energy prices have impacted the poor and elderly as well as the economies and investment in those countries? And of

Germany, Spain, France and the U.K., which ones do you think stand out as a good model for what EPA wants to do with the ESPS and regulating CO2?

Science Questions

1. Is carbon dioxide critical to the process of photosynthesis and life on earth?

2. As EPA moves forward with regulating carbon dioxide will carbon dioxide be the first gas regulated under the Clean Air Act that humans exhale at a higher rate than they inhale?

3. What percent of CO2 in the atmosphere is emitted by humans?

4. In earth's geologic history is their evidence that CO2 in the atmosphere has been higher than it is today?

5. In 2009 Al Gore predicted "The entire north polar ice cap will be gone in 5 years." Did this prediction come true?

6. Stephen Schneider, who authored The Genesis Strategy, a 1976 book warning that global cooling risks posed a threat to humanity, later changed that view 180 degrees when he served as a lead author for important parts of three sequential IPCC reports. In an article published in Discover, he said: "On the one hand, as scientists we are ethically bound to the scientific method, on the other hand, we are not just scientists, but human beings as well. And like most people, we'd like to see the world a better place, which in this context translates into our working to reduce the risk of potentially disastrous climatic change. To do that, we need to get some broad-based support, to capture the public's imagination. That, of course, entails getting loads of media coverage. So we have to offer up scary scenarios, make simplified, dramatic statements, and make little mention of the doubts we might have. Each of us has to decide what the right balance is between being effective and being honest." Does EPA agree with these statements?

7. Timothy Wirth, former U.S. Senator (D-CO) and former U.S. Undersecretary of State for global issues, at the first UN Earth Climate Summit Rio de Janeiro stated: "We have got to ride the global warming issue. Even if the theory of global warming is wrong, we will be doing the right thing in terms of economic policy and environmental policy." Does EPA agree with these statements?

8. Speaking at the 2000 U.N. Conference on Climate Change in the Hague, former President Jacques Chirac of France explained why the IPCC's climate initiative supported a key Western European Kyoto Protocol objective: "For the first time, humanity is instituting a genuine instrument of global governance, one that should find a place within the World Environmental Organization which France and the European Union would like to see established." Does EPA support reaching a treaty in Paris so that there can be a "global governance" of U.S. economic policy?

9. On November 14, 2010, Ottmar Edenhofer, a U.N. IPCC Official, stated, "First of all, developed countries have basically expropriated the atmosphere of the world community. But one must say clearly that we redistribute de facto the world's wealth by climate policy. Obviously, the owners of coal and oil will not be enthusiastic about this. One has to free oneself from the illusion that international climate policy is environmental policy. This has almost nothing to do with environmental policy anymore..." Does EPA agree with these statements?

10. Attorney David Sitarz, a key editor of the UN's Agenda 21 document, stated at the UN's 1992 Conference on Environment and Development in Brazil, "Effective execution of Agenda 21 will require a profound reorientation of all human society, unlike anything the world has ever experienced—a major shift in the priorities of both governments and individuals and an unprecedented redeployment of human and financial resources. This shift will demand that a concern for the environmental consequences of every human action be integrated into individual and collective decision-making at every level." Does EPA agree with these statements?

Other

1. Section 111 of the Clean Air Act provides EPA the authority to regulate new and existing "stationary sources" which it defines under subsection (a) as "any building, structure, facility, or installation which emits or may emit any air pollutant". That seems pretty straight forward, and yet you propose a rule for existing sources that would force states to significantly increase renewable — which do not emit any air pollutants. What percent of the claimed reductions under your proposed rule does EPA anticipate will come from increases in renewable energy? Given the plain meaning of the statute, how can you set a standard that in essence relies on such an increase in renewable power — a non-emitting source of electricity not covered by Section 111?

2. Section 111(d), the authority for the Clean Power Plan, regulates existing sources. However, your proposed rule seeks comment on including new sources in a state's 111(d) plan. What new sources do you think should be included in a state's plan for existing sources. Isn't it true that Section 111 has a separate subsection for the regulation of new sources under subsection (b) --- not (d). Why do you think you have the authority to regulate new sources under section 111(d)?

3. Your proposed rule for NEW units would require CCS for new coal units despite the fact that CCS has not been adequately demonstrated and is not considered to be commercially viable. In fact a recent DOE authorized study just concluded in January that "CCS does not yet meet this best system of emission reduction (BSER) standard, because it has not yet been adequately demonstrated." (pg 103 of http://insideepaclimate.com/sites/insideepaclimate.com/files/documents/jan2015/epa2015_0144.pdf) What will happen to your existing plant rule if your new rule is overturned in Court? Do you believe you have the authority under Section 111 to issue an existing plant rule if your rule for new units is vacated?

4. There are many coal plants out there that have just spent millions of dollars to comply with the MATS rule. And yet, under your proposed rule, these units will likely be allowed to run only at very low capacity levels that make the units uneconomical. Has there ever been a major rule making by EPA where the standard was not based on specific control technologies but rather a limit on how often a unit can be run? Do you believe the CAA allows you to establish regulations that can force the closure of existing coal plants by establishing de-facto limits on how often they can run?

5. If you are forced to issue a federal implementation plan, which entities do you have enforcement authority over in the context of this rule making? Do you believe EPA can enforce renewable energy targets or demand side management programs in a state that fails to submit an implementation plan? Does your authority extend to the states directly or just to the existing stationary sources as defined by the Clean Air Act? If your answer is that you are working through these issues now—how EPA can propose a rule without knowing the limits of its own regulatory authorities?

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR 15 2015

OFFICE OF
AIR AND RADIATION

The Honorable James M. Inhofe
Chairman
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for your letter of March 10, 2015, to U.S. Environmental Protection Agency Administrator Gina McCarthy, regarding the EPA's recent Ozone National Ambient Air Quality Standards (NAAQS) proposed rule. The Administrator asked that I respond on her behalf.

As you know, the EPA sets the NAAQS to protect public health and the environment from six common pollutants, including ground-level ozone. The Clean Air Act requires the EPA to review these standards every five years to ensure that they are sufficiently protective. On November 25, 2014, the EPA proposed to strengthen the NAAQS for ground-level ozone, based on extensive scientific evidence about ozone's effects. The proposed updates will improve public health protection, particularly for children, the elderly, and people of all ages who have lung diseases such as asthma.

During each review there is an opportunity for the public to comment on proposed decisions. We will give your comments thoughtful consideration and have placed them in the docket.

By law, the EPA cannot consider costs in setting the NAAQS. However, as required by Executive Orders 12866 and 13563, and guidance from the White House Office of Management and Budget, the EPA analyzes the benefits and costs of implementing the standards. Based on our analysis, the benefits of reducing smog-forming emissions outweigh the estimated costs. Ultimately, the costs of meeting the standards will be determined by the steps states decide to take in the future. Our estimates are illustrative and history shows that the costs are likely to be lower than we have projected. This is because much, if not all, of the pollution reductions needed to help states and communities meet these standards will be accomplished by existing and proposed federal programs, such as the Tier 3 standards for cleaner cars and gas, and the Cross State Air Pollution Rule. We will certainly consider your specific comments on these issues.

Again, thank you for your letter. If you have further questions, please contact me or your staff may contact Kevin Bailey in the EPA's Office of Congressional and Intergovernmental Relations at bailey.kevinj@epa.gov or at (202) 564-2998.

Sincerely,

Janet G. McCabe
Acting Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 22 2015

OFFICE OF CONGRESSIONAL
AND INTERGOVERNMENTAL RELATIONS

The Honorable James M. Inhofe
Chairman
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for your letter of February 26, 2015, to Acting Assistant Administrator Janet McCabe requesting responses to Questions for the Record following the February 11, 2015, hearing before the Committee on Environment and Public Works tilted, "Oversight Hearing: EPA's Proposed Carbon Dioxide Emissions Rule for New, Modified, and Existing Power Plants."

The responses to the questions are provided as an enclosure to this letter. If you have any further questions please contact me, or your staff may contact Kevin Bailey at bailey.kevinj@epa.gov or (202) 564 2998.

Sincerely,

Laura Vaught

Laura Vaught
Associate Administrator

Questions for the Record
Senate Environment and Public Works Committee
Oversight Hearing Titled: Examining EPA's Proposed Carbon Dioxide Emissions Rule for New, Modified, and Existing Power Plants

Janet McCabe, Acting Assistant Administrator

Chairman Inhofe:

1. In 2013, four nuclear reactors prematurely closed. One of those reactors was the Kewaunee plant in Wisconsin. When EPA set the reduction target for Wisconsin, it did so based on electricity production in 2012, a year in which Kewaunee was still operating.

    a. This means Wisconsin will be forced to meet a more stringent target, correct?

Nuclear power is part of an all-of-the-above, diverse energy mix and provides a reliable, base load source of low-carbon power. Nuclear energy can help the U.S. meet its goals to reduce carbon pollution and meet clean air standards. The EPA is currently reviewing the more than 4.3 million comments received on the proposal, including comments about specific nuclear units and specific Electric Generating Units (EGUs), and will continue to consider this and other comments raised as we develop the requirements for the final Clean Power Plan.

2. There are currently five nuclear reactors under construction, in Georgia, South Carolina and Tennessee. Since they are under construction, they clearly did NOT produce electricity in 2012. However, the Congressional Research Service found that EPA's plan "substantially lowers" the targets in those states to account for their investments in nuclear power, making their targets more stringent and harder to achieve.

    a. Did EPA similarly penalize states with wind projects under construction, assuming *their* existence in setting targets for those states, making those states' targets harder to achieve?

    b. Why does nuclear energy receive such arbitrary treatment?

    c. Shouldn't EPA treat hydropower, nuclear power, and other sources of zero-emission electricity the same?

    d. If states rely upon new reactors in their State Implementation Plans under the proposed rule, will EPA penalize the states if the NRC refuses to allow those reactors to begin operating?

Nuclear power is part of an all-of-the-above, diverse energy mix and provides a reliable, base load source of low-carbon power. Nuclear energy can help the U.S. meet its goals to reduce carbon pollution and meet clean air standards. In the proposal, we requested comment on approaches to nuclear power, including considering five

under-construction nuclear units at three plants and providing an incentive to preserve nuclear power generation at existing plants across the country. Many commenters have provided information, including that they would like equitable treatment of the Best System of Emission Reduction (BSER) requirements across states and in particular would like similar treatment among the low- and zero-emitting sources of power. We have engaged in outreach to numerous stakeholders about nuclear power, renewable energy, and other low- and zero-emitting sources of power to better understand issues raised in their comments and we are giving careful consideration to all comments received as we develop the requirements for the final Clean Power Plan.

3. Economic modeling of climate legislation by EPA, EIA, and others has consistently shown that dramatic growth in nuclear energy is necessary to reduce carbon emissions and that constrained development of nuclear energy dramatically increases the costs of compliance. If fact, in 2008, EPA determined that 44 new reactors would be needed by 2025 to satisfy the requirements of S. 2191, known as the Lieberman-Warner bill. In 2009, EIA determined that 96 gigawatts of new nuclear capacity would be needed by 2030 under HR 2454, the Waxman-Markey bill.

    a. How many new reactor licenses are actively being reviewed by the NRC?

    b. How many <u>new</u> reactors, in addition to those currently under construction, are necessary to enable compliance under EPA's base case for the proposed rule?

    c. How does EPA plan to meet its carbon emission reductions *without* increasing the use of nuclear energy or even replacing the units that currently provide the bulk of our carbon-free electricity?

Nuclear power is part of an all-of-the-above, diverse energy mix and provides a reliable, base load source of low-carbon power. The requirements of the proposed Clean Power Plan differ to a great extent from the elements that constituted both the Lieberman-Warner bill and the Waxman-Markey bill. In the Clean Power Plan proposal, we considered the impact of nuclear power as part of the energy mix for consideration of the proposed elements of the rule and requested public comment. The five nuclear units that commenced construction prior to issuance of the proposal were considered existing plants at the time of proposal and we have received several comments on this determination. New nuclear units were not projected or incorporated into the setting of the proposed BSER.

The EPA also notes that the proposed Clean Power Plan builds on what states are already doing to reduce carbon pollution from existing power plants. The Clean Power Plan empowers states to chart their own, customized path to meet their goals in a manner that is sensitive to each state's unique circumstances. We are aware of six applications for new licenses under active review at the Nuclear Regulatory Commission. In addition, we have met with Georgia, South Carolina, and Tennessee on several occasions to discuss the proposed requirements for facilities under

construction and we are giving careful consideration to all comments received as we develop the requirements for the final Clean Power Plan.

4. For states that do not submit a state implementation plan, what mechanisms of enforcement will the EPA rely to impose a federal plan under the Clean Power Plan proposal? Please provide the statutory cite by which EPA will rely for each enforcement mechanism. Will EPA depend on 3rd party environmental groups to file suits against the states to push enforcement? Would EPA make compliance with the Clean Air Act a requisite for federal permits? If so, what permits?

Under Section 111(d) the EPA is proposing a two-part process where the EPA sets state-specific goals to lower carbon pollution from power plants, and then the states must develop plans to meet those goals. States develop plans to meet their goals, but EPA is not prescribing a specific set of measures for states to put in their plans. This gives states flexibility. States will choose what measures, actions, and requirements to include in their plans, and demonstrate how these will result in the needed reductions. The Clean Air Act provides for EPA to write a federal plan if a state does not put an approvable state plan in place. In response to requests from states and stakeholders since the proposed Clean Power Plan was issued, EPA announced in January 2015 that we will be starting the regulatory process to develop a rule that would set forth a proposed federal plan and could provide an example for states as they develop their own plans. EPA's strong preference remains for states to submit their own plans that are tailored to their specific needs and priorities. The agency expects to issue the proposed federal plan for public review and comment in summer 2015.

5. In response to a question from Sen. Wicker about stranded assets, Acting Assistant Administrator McCabe testified that EPA is being careful "not to put plants in a position of stranding assets." Please explain what specific steps EPA has proposed -- or is contemplating -- to avoid stranding assets and investments existing facilities have made to comply with Clean Air Act and other environmental requirements.

The EPA's proposed state goals do not impose specific requirements on any individual source. Instead, states have the flexibility to choose their own compliance pathways, including avoiding stranded assets. Following publication of the proposed rule, EPA published a Notice of Data Availability [79 FR 64543, October 30, 2014] that provided additional information on certain issues that had been consistently raised by a diverse set of stakeholders, including ideas about the glide path of emission reductions from 2020-2029 and other topics that have been identified as potentially related to the remaining asset value of existing coal-fired generation.

6. Acting Assistant Administrator McCabe also testified that EPA is working with state regulators to see whether there is flexibility "to provide a path" for avoiding stranding assets. Please identify which states you are working with on this issue, and describe the "potential paths" being discussed.

The outreach to and response from the public on the Clean Power Plan has been unprecedented, including outreach to and feedback from stakeholders from all 50

states. More than 4.3 million comments have been submitted and EPA is examining and carefully considering all the issues raised in those comments.

7. Please provide a detailed explanation of the flexibility afforded to states by the Clean Air Act and EPA's 111(d) implementing regulations (40 C.F.R. part 60, subpart B) to grant variances to specific facilities allowing for different emission standards and longer compliance periods without increasing the burden on other facilities within the state.

The proposed Clean Power Plan builds on what states are already doing to reduce carbon pollution from existing power plants. It does not require that the states actually use each of the building blocks as they develop their plans for meeting the state goal. Instead, it empowers the states to chart their own, customized path to meet their goals. Under the proposal, the states have a flexible compliance path that allows them to design plans sensitive to their needs, including requiring different standards from different individual sources.

8. Please identify with specificity the factors, other than plant age, location, design, or remaining useful life, that states may consider under 40 C.F.R. 60.24(f)(3) in determining when a less stringent standard or final compliance time is "significantly more reasonable." Would the fact that a plant recently made significant capital expenditures to install pollution controls to comply with Clean Air Act programs qualify for relief under 40 C.F.R. 60.24(f)(3)? If so, under what circumstances? If not, why?

The proposed Clean Power Plan builds on what states are already doing to reduce carbon pollution from existing power plants. It does not require that the states actually use each of the building blocks as they develop their plans for meeting the state goal. Instead, it empowers the states to chart their own, customized path to meet their goals. Under the proposal, the states have a flexible compliance path that allows them to design plans sensitive to their needs, including requiring different standards from different individual sources.

9. In the preamble to the proposed Clean Power Plan, EPA states that "the flexibility provided in the state plan development process adequately allows for consideration of the remaining useful life of the affected facilities and other source-specific factors and, therefore, that separate application of the remaining useful life provision by states is unnecessary." In other words, EPA appears to be saying that because EPA has provided flexibility in state plans, states are prohibited from further consideration of remaining useful lives and other factors for facilities within their state. Please explain with specificity EPA's legal authority for limiting state flexibility in this way, including why such a restriction is not inconsistent with Clean Air Act section 111(d)(1), which provides that EPA "regulations...*shall permit* the State in applying a standard of performance...to take into consideration, among other factors, the remaining useful life of the existing source." (Emphasis added).

Along with the proposed rule, the EPA included in the docket a Legal Memorandum providing background for the legal issues raised by the rule. In addition to the preamble, that Legal Memorandum details the EPA's understanding, at the time of proposal, of the legal issues in the state planning process. That document can be found using Docket ID Number EPA-HQ-OAR-2013-0602-0419. The EPA is currently reviewing the more than 4.3 million comments received on the proposal, including the comments on the issues addressed in the Legal Memorandum, and will respond to the issues raised in those comments when we issue a final Clean Power Plan.

10. EPA further provides in the preamble to the proposed rule that, 'to the extent that a performance standard that a state may wish to adopt for affected EGUs raises facility-specific issues, the state is free to make adjustments to a particular facility's requirements on facility- specific grounds, so long as any such adjustments are reflected (along with any necessary compensating emission reductions) as part of the state's CAA section 111(d) plan submission." Please explain with specificity EPA's legal authority for conditioning states' variance authority in this way. Also, please explain how such a restriction is not inconsistent with CAA section 111(d) and would not restrict a state's flexibility to avoid stranding assets.

Along with the proposed rule, the EPA included in the docket a Legal Memorandum providing background for the legal issues raised by the rule. In addition to the preamble, that Legal Memorandum details the EPA's understanding, at the time of proposal, of the legal issues in the state planning process. That document can be found using Docket ID Number EPA-HQ-OAR-2013-0602-0419. The EPA is currently reviewing the more than 4.3 million comments received on the proposal, including the comments on the issues addressed in the legal memorandum, and will respond to the issues raised in those comments when we issue a final Clean Power Plan.

Senator Booker:

1. Nuclear power plants currently provide 60 percent of the nation's emissions-free power generation, and are especially important in states like New Jersey. Many of these existing power plants are under market pressures that could lead them to be replaced with emitting generation. The Clean Power Plan proposal attempts to address existing nuclear power by factoring six percent of emissions-free nuclear generation into each state's target. In most states, including New Jersey, this provides a negligible incentive to avoid replacing this generation with gas.

    a. What changes are the EPA exploring to ensure the Clean Power Plan strongly encourages states to maintain nuclear generation as a critical resource?

Nuclear power is part of an all-of-the-above, diverse energy mix and provides a reliable, base load source of low-carbon power. Nuclear energy can help the U.S. meet its goals to reduce carbon pollution and meet clean air standards. The EPA is currently reviewing the more than 4.3 million comments received on the proposal, including comments

about specific nuclear units and specific EGUs, and will continue to consider this and other comments raised as we develop the requirements for the final Clean Power Plan.

2. After the Clean Power Plan is finalized this year, states will be able to comply with it by designing state-specific plans that are responsive to state and local needs.

    a. As states design their implementation plans, what flexibility will they have to support existing nuclear power beyond any mechanisms or crediting specifically included in the proposed rule?

    b. Will there be ways states can specifically encourage nuclear units to operate beyond their initial licensing periods, to the extent units can do so safely?

Nuclear power is part of an all-of-the-above, diverse energy mix and provides a reliable, base load source of low-carbon power. Nuclear energy can help the U.S. meet its goals to reduce carbon pollution and meet clean air standards. In the proposal, the EPA proposed to determine that finalizing construction of five new nuclear units at three plants and preserving nuclear power generation at existing plants across the country could be two cost-effective ways to avoid emissions from fossil fuel-fired power plants. One of the goals of the Clean Power Plan is to afford states the flexibility they require to meet the goals. The Clean Power Plan empowers the states to chart their own, customized path to meet their goals in a manner that is sensitive to the unique circumstances in each state. States may employ strategies, if they so choose, to encourage nuclear power. The EPA is currently reviewing the more than 4.3 million comments received on the proposal, including the comments on the treatment of nuclear power, and will respond to the issues raised in those comments when we issue a final Clean Power Plan.

3. I have heard concerns about unintended consequences that could arise from the Clean Power Plan as proposed. Specifically, the dramatic early reduction requirements proposed in the rule may render several coal plants uneconomic, and therefore encourage states to turn to the rapid deployment of new natural gas combined cycle generation to satisfy their energy needs. Large amounts of new natural gas power plants have the potential to disincentivize construction of renewable and other clean energy technology for decades because states can comply with the Plan from the reduced carbon emissions from natural gas power plants. This has the potential to tilt the playing field in the power sector towards new natural gas fired power plant at the expense of renewable energy.

    a. Can the EPA avoid the potential prioritization of power from natural gas power plants and encourage states to adopt renewable and clean energy technology?

    b. Can you please provide me with an update on some of the modifications EPA is considering to ensure that the final Plan incentivizes the use of renewables to the maximum extent possible?

The proposed Clean Power Plan builds on what states are already doing to reduce carbon pollution from existing power plants. It does not require that the states actually use each of the building blocks as they develop their plans for meeting the state goal. Instead, it empowers the states to chart their own, customized path to meet their goals.

Following publication of the proposed rule, EPA published a Notice of Data Availability [79 FR 64543, October 30, 2014] that provided additional information on certain issues that had been consistently raised by a diverse set of stakeholders, including ideas about the glide path of emission reductions from 2020-2029.

4. Minority communities, including communities of color, are disproportionately affected by pollution. With President Clinton's 1994 Executive Order 12898, and President Obama's continued support for that executive order, the environmental justice movement has grown in the past couple of decades. The EPA, with the Clean Power Plan, has a unique platform to tackle issues of environmental justice and equity.

    a. Is the EPA contemplating requiring states to consider the environmental justice impacts of their state implementation plans in order to comply with the Clean Power Plan?

    b. If not, why not?

    c. If so, will the EPA offer states guidance on ways to measure compliance for the environmental justice impacts of states' implementation plans?

During our extensive outreach process, EPA met with environmental justice advocates and community leaders. The EPA is currently reviewing the more than 4.3 million comments received on the proposal, including comments about the proposal's consideration of environmental justice issues, and will respond to the issues raised in those comments when we issue a final Clean Power Plan.

Senator Fischer:

BUILDING BLOCK 1 (COAL PLANT EFFICIENCY)

- During our discussion at the hearing regarding Building Block 1 and the achievable heat rate improvements at coal-fired plants, you stated that EPA's assumption in going into the proposal "was not that every single source would be able to achieve exactly the amount of reductions [you] identified in each building block...[you] believed that some can do ***more*** in one area and some may choose to do less in other areas." In Nebraska, there are no coal-fired power plants that are capable of achieving a heat rate improvement of 6%. Did EPA receive public comment from any utilities or state departments of environmental quality that identified any plant of being able to achieve this rate improvement? Or a rate that is ***more*** than the target identified by EPA?

- Do you acknowledge that EPA misused the Sargent & Lundy study in setting the heat rate improvement goals for Building Block 1?

- Installation of additional pollution control equipment will degrade a unit's heat rate performance. Given that regulations such as MATS and Regional Haze are driving the installation of more control equipment on coal-fired units, what type of adjustments will be made in the rule to account for such EPA-driven degradations?

In the proposed Clean Power Plan, the EPA proposed four Building Blocks that make up the "best system of emission reduction ... adequately demonstrated" (BSER) that, in turn, serves as the basis for the state CO2 emissions goals. The EPA discussed its justification for why those measures, including the heat rate improvement you mentioned which we identified as Building Block 1, qualify as part of the BSER to reduce emissions at regulated sources at length in the preamble for the proposed rule (79 Fed. Reg. 34,830, 34,878 – 34,892), the GHG Abatement Measures Technical Support Document (http://www2.epa.gov/sites/production/files/2014-06/documents/20140602tsd-ghg-abatement-measures.pdf), and the accompanying Legal Memorandum (Docket ID Number EPA-HQ-OAR-2013-0602-0419, pages 33-93). The EPA is currently reviewing the more than 4.3 million comments received on the proposal, including the comments on the issues addressed in the Technical Support Documents and the Legal Memorandum, and will respond to the issues raised in those comments when we issue a final Clean Power Plan.

<u>BUILDING BLOCK 2 (NATURAL GAS CC UTILIZATION)</u>

- Nebraska DEQ stated in its public comments that a 70% utilization rate at natural gas plants is neither sustainable, nor achievable. Nebraska does not have adequate natural gas supplies or pipeline infrastructure to sustain a 70% utilization rate of existing natural gas combined-cycle plants, particularly during colder months.[2] FERC memos indicate that last April, FERC's Office of Electric Reliability told EPA that its assumptions in building block 2 overestimated natural gas combined cycle capacity factors and that FERC "had doubts about the ability to expand the pipeline infrastructure as quickly as the emission targets implied."[3] Why didn't EPA go back and fix those assumptions based on FERC's feedback?

In the proposed Clean Power Plan, the EPA proposed four Building Blocks that make up the "best system of emission reduction ... adequately demonstrated" (BSER) that, in turn, serves as the basis for the state CO2 emissions goals. The EPA discussed its justification for why those measures, including the natural gas capacity factor you mentioned, qualify as part of the BSER to reduce emissions at regulated sources at length in the preamble for the proposed rule (79 Fed. Reg. 34,830, 34,878 – 34,892), the GHG Abatement Measures Technical Support Document (http://www2.epa.gov/sites/production/files/2014-06/documents/20140602tsd-ghg-abatement-measures.pdf), and the accompanying Legal Memorandum (Docket ID Number EPA-HQ-OAR-2013-0602-0419, pages 33-93). The EPA is currently reviewing the more than 4.3 million comments received on the proposal, including

the comments on the issues addressed in the Technical Support Documents and the Legal Memorandum, and will respond to the issues raised in those comments when we issue a final Clean Power Plan.

BUILDING BLOCK 3 (RENEWABLES)

- The Nebraska Department of Environmental Quality thinks that its "disingenuous" to require states to undertake measures that the EPA itself may not have the authority to implement. What authority does EPA or the Nebraska DEQ have to mandate renewables?

In the proposal, the EPA estimated the potential renewable energy available to states as part of BSER by developing a scenario based on Renewable Portfolio Standard (RPS) requirements already established by a majority of states. The basis for Building Block three is discussed at length in the preamble to the proposal (79 FR 34830-34950) and the GHG Abatement Measures Technical Support Document (http://www2.epa.gov/sites/production/files/2014-06/documents/20140602tsd-ghg-abatement-measures.pdf). EPA does not propose to require the inclusion of any particular type of measures as plans are developed for meeting the state goal. Instead, states are empowered to chart their own, customized paths to meet their goals.

Under Section 111(d) the EPA is proposing a two-part process where the EPA sets state-specific goals to lower carbon pollution from power plants, and then the states must develop plans to meet those goals. States develop plans to meet their goals, but EPA is not prescribing a specific set of measures for states to put in their plans. This gives states flexibility. States will choose what measures, actions, and requirements to include in their plans, and demonstrate how these will result in the needed reductions.

INTERIM TARGETS

- In December, I led a group of 23 Republican Senators in writing to EPA regarding key concerns with the proposed Clean Power Plan. Senator McCaskill led a parallel letter that was sent by a group of Democrat Senators raising the same concerns, including the unrealistic interim targets (known as the "2020 cliff"). The consequences of these front-loaded targets have been echoed by many stakeholders. Will you commit to removing these interim targets?

The EPA's proposed state goals do not impose specific requirements on any individual source. Instead, states have the flexibility to choose their own compliance pathways. Following publication of the proposed rule, the EPA published a Notice of Data Availability [79 FR 64543, October 30, 2014] that provided additional information on certain issues that had been consistently raised by a diverse set of stakeholders, including ideas about the glide path of emission reductions from 2020-2029. The EPA is currently reviewing the more than 4.3 million comments received on the proposal, including the comments on the issues addressed in the Technical Support Documents and the legal memorandum, and will respond to the issues raised in those comments

when we issue a final Clean Power Plan.

RFS

- As you know, renewable fuels like ethanol and biodiesel are an important economic driver in my state. Unfortunately, the EPA has yet to release their yearly volumes for both 2014 and 2015. When do you plan to release this rule? Will it no longer contain methodology that artificially limits the market access of biofuels producers?

EPA has issued a proposed rule to establish renewable fuels volumes for 2014, 2015, and 2016, as well as biodiesel for 2017; the proposal was published in the Federal Register on June 10, 2015.

Senator Sessions:

1) In your written testimony, you state that if climate change is left unchecked, it will have "devastating impacts on the United States and the planet." You write further that "the costs of inaction are clear. We must act. That's why President Obama laid out a Climate Action Plan."

a. Does the United States Constitution authorize the executive branch to act unilaterally and impose regulatory mandates due to "inaction," or the absence of a valid authorization from Congress?

b. Bjorn Lomborg—who testified before the Clean Air and Nuclear Safety Subcommittee last Congress—wrote in the *Wall Street Journal* earlier this month about studies which have showed that in recent years, there have been fewer droughts, decreased hurricane damage, and a rise in temperatures that is 90% less than what many climate models had predicted. Mr. Lomborg's July 2014 testimony to the Subcommittee also indicated that the cost of climate "inaction" by the end of the century is equivalent to an annual loss of GDP growth on the order of 0.02%.

Given that recent temperature rises have been significantly less than what many climate models predicted, does it remain EPA's position that climate "inaction" will have "devastating impacts on the United States and the planet"? Does the agency agree or disagree with Mr. Lomborg's testimony regarding the minimal loss of GDP growth due to climate "inaction"? Please provide all information, data, and studies used to support EPA's conclusion.

c. You are advocating dramatic action at great cost to the American people to avert "devastating impacts" of global warming. Before such costs are imposed on the people, it is essential that you lay out in detail the "devastating impacts on the United

States" that EPA anticipates due to climate inaction. Please provide in detail these impacts as well as a timeline for when these impacts are expected to occur.

d. If the latest and best available science demonstrates that the climate impacts projected by EPA are not occurring, or are less than anticipated, would the agency be willing to reconsider its climate action policy?

The EPA is acting pursuant to Section 111(d) of the Clean Air Act, which provides for the establishment of standards of performance for categories of stationary sources that contribute to dangerous air pollution. In the preamble to the proposed rule, we discussed the scientific basis for our action at page 79 FR 34841.

2) EPA's Clean Power Plan is based in part on a "building block" which assumes states will achieve a 1.5% annual increase in demand-side energy efficiency.

a. Please provide the provisions in the United States Constitution and Clean Air Act which authorize EPA to base its Clean Power Plan on *consumers* increasing their energy efficiency. How does EPA intend to implement this particular "building block"?

b. Please provide the peer-reviewed or technical studies which EPA used to establish the "building block" for a 1.5% annual increase in demand-side efficiency.

c. To what extent did EPA account for population growth in establishing a "building block" whose purpose is to reduce aggregate demand on power plants?

The basis for EPA's fourth Building Block, demand-side energy efficiency, is the proposed conclusion that over time states can achieve electricity savings of 1.5% annually. This Building Block is one of four that make up the "best system of emissions reduction ... adequately demonstrated" (BSER) that, in turn, serves as the basis for the state CO2 goals. The basis for Building Block four is discussed at length in the preamble to the proposal (79 FR 34830-34950) and the GHG Abatement Measures Technical Support Document (http://www2.epa.gov/sites/production/files/2014-06/documents/20140602tsd-ghg-abatement-measures.pdf). EPA does not propose to require the inclusion of any particular type of measures, including demand-side energy efficiency, as plans are developed for meeting the state goal. Instead, states are empowered to chart their own, customized paths to meet their goals. The EPA is currently reviewing the more than 4.3 million comments received on the proposal, including the comments on the issues addressed in the Technical Support Documents and the Legal Memorandum, and will respond to the issues raised in those comments when we issue a final Clean Power Plan.

3) EPA claims that the Clean Power Plan's "timing flexibility" will allow municipally owned utilities and some electric cooperatives to "use both short-term dispatch strategies and longer-term capacity planning strategies to reduce GHG emissions." However, these providers often purchase power from dedicated units, sometimes crossing state lines, on long-term contracts. Long-term contracts in many circumstances yield the most reliable pricing. How does EPA reconcile the interim goals contained in the Clean Power Plan with the need of municipally owned utilities and some electric cooperatives to enter into long-term contracts in order to provide reliable pricing for their customers?

The EPA's proposed state goals do not impose specific requirements on any individual source. Instead, states have the flexibility to choose their own compliance pathways. Following publication of the proposed rule, EPA published a Notice of Data Availability [79 FR 64543, October 30, 2014] that provided additional information on certain issues that had been consistently raised by a diverse set of stakeholders, including ideas about the glide path of emission reductions from 2020-2029. The EPA is currently reviewing the more than 4.3 million comments received on the proposal, including the comments on the issues addressed in the Technical Support Documents and the Legal Memorandum, and will respond to the issues raised in those comments when we issue a final Clean Power Plan.

4) During a recent taxpayer-funded trip to the Vatican, Administrator McCarthy indicated that it is important to look after the well-being of persons living in poverty. What has EPA done to evaluate the adverse wage and employment impacts that have fallen on middle-class workers?

Consistent with statute, Executive Order, and OMB guidance, the EPA conducted a Regulatory Impact Analysis that shows the benefits and costs of illustrative scenarios states may choose in complying with the proposed Clean Power Plan. Because states have flexibility in how to meet their goals, the actions taken to meet the goals may vary from what is modeled in the illustrative scenarios. Specific details, including information about how costs and benefits are estimated are available in the RIA (http://www2.epa.gov/sites/production/files/20 1 4-06/documents/20 140602ria-clean-powerplan.pdf).

5) In recent years, the U.S. Army Corps of Engineers has proposed operational changes that would diminish the amount of hydropower available to communities in Alabama. Please explain how EPA's proposed carbon dioxide emissions rules account for Army Corps decisions which may adversely affect the ability of Alabama communities to rely on hydropower as a low-carbon source of energy.

The proposed Clean Power Plan builds on what states are already doing to reduce carbon pollution from existing power plants. It does not require that the states actually use each of the building blocks as they develop their plans for meeting the state goal.

Instead, it empowers the states to chart their own, customized path to meet their goals. The EPA is currently reviewing the more than 4.3 million comments received on the proposal, including comments about the proposal's consideration of existing zero-emitting energy sources, and will respond to the issues raised in those comments when we issue a final Clean Power Plan.

6) President Obama has stated that "we need to increase our supply of nuclear power," and that we should be "building a new generation of safe, clean nuclear power plants in this country." How many new reactors, in addition to those currently under construction, are necessary to enable compliance under EPA's base case for the proposed rule?

Nuclear power is part of an all-of-the-above, diverse energy mix and provides a reliable, base load source of low-carbon power. New nuclear units were not projected and incorporated into the setting of the proposed Best System of Emission Reduction (BSER). The proposed Clean Power Plan builds on what states are already doing to reduce carbon pollution from existing power plants. The Clean Power Plan empowers the states to chart their own, customized path to meet their goals in a manner that is sensitive to the unique circumstances in each state.

7) In its 2012 decision remanding the Nuclear Regulatory Commission's Waste Confidence rule, the DC Circuit Court observed:

> *"At this time, there is not even a prospective site for a repository, let alone progress toward the actual construction of one... The lack of progress on a permanent repository has caused considerable uncertainty regarding the environmental effects of temporary [spent nuclear fuel] storage and the reasonableness of continuing to license and relicense nuclear reactors."*

The Administration's actions to shut down the Yucca Mountain program caused a federal court to question the reasonableness of licensing nuclear plants, triggering a two-year licensing moratorium at the NRC. The NRC has since revised its rule, which has once again been challenged by the NRDC, a proponent of the Clean Power Plan. Given that nuclear energy generates nearly two-thirds of our nation's carbon-free electricity, how does EPA envision achieving carbon reductions if our largest source of carbon-free electricity is threatened based on the Administration's decision to illegally abandon the Yucca Mountain project?

Nuclear power is part of an all-of-the-above, diverse energy mix and provides a reliable, base load source of low-carbon power. New nuclear units were not projected and incorporated into the setting of the proposed BSER. The proposed Clean Power Plan builds on what states are already doing to reduce carbon pollution from existing power plants. The Clean Power Plan empowers the states to chart their own, customized path to meet their goals in a manner that is sensitive to the unique

circumstances in each state.

Senator Sullivan:

1) Has the EPA conducted any analysis specific to Alaska that proves the Proposed Rule on existing plants can be reasonably implemented and would not impair electricity reliability in Alaska? Do you have modelling or cost information specific to Alaska? Do you have any analysis specific to Interior Alaska? Please provide all relevant data.

Consistent with statute, Executive Order, and OMB guidance, the EPA conducted a Regulatory Impact Analysis that shows the benefits and costs of illustrative scenarios states may choose in complying with the proposed Clean Power Plan. Because states have flexibility in how to meet their goals, the actions taken to meet the goals may vary from what is modeled in the illustrative scenarios. Specific details, including information about how costs and benefits are estimated are available in the RIA (http://www2.epa.gov/sites/production/files/20 1 4-06/documents/20 140602ria-clean-powerplan.pdf).

2) How much flexibility is the EPA prepared to provide states if efficiency upgrades to power plants, building new generation sources, new or upgraded transmission lines or new natural gas pipelines are slowed down or stopped because of environmental reviews or litigation?

The proposed Clean Power Plan builds on what states are already doing to reduce carbon pollution from existing power plants. It does not require that the states actually use each of the building blocks as they develop their plans for meeting the state goal. Instead, it empowers the states to chart their own, customized path to meet their goals. Under the proposal, the states have a flexible compliance path that allows them to design plans sensitive to their needs, including considering the time it will take to put in place the necessary infrastructure.

3) Alaska's grid is quite limited, and most of our utilities are not interconnected. Also, Alaska is islanded, as we are not connected to the North American power grid. Does the Proposed Rule for existing plants contemplate this scenario?

The Clean Power Plan proposal contemplated that some aspects of the four building blocks might apply differently in particular locations, including Alaska and Hawaii. One example of this is on 79 FR 34867, where we proposed to treat Alaska and Hawaii as separate regions in estimating the reductions they could achieve by increasing renewable energy generation under Building Block 3.

4) Alaska has a single transmission line north and south of Anchorage with limited transference capacity. One of the presumptions of EPAs "building blocks" is the notion that more efficient combined-cycle gas generation can be substituted for coal-fired generation. Will there be exceptions made for states where the grid does not allow the transfer of sufficient quantities of energy to replace local coal-fired

generation?

The proposed Clean Power Plan builds on what states are already doing to reduce carbon pollution from existing power plants. It does not require that the states actually use each of the building blocks as they develop their plans for meeting the state goal. Instead, it empowers the states to chart their own, customized path to meet their goals. Under the proposal, the states have a flexible compliance path that allows them to design plans sensitive to their needs, including considering the time it will take to put in place the necessary infrastructure.

In the proposed Clean Power Plan, the EPA proposed four Building Blocks that make up the "best system of emission reduction ... adequately demonstrated" (BSER) that, in turn, serves as the basis for the state CO2 emissions goals. The EPA discussed its justification for why those measures, including the increased utilization of existing natural gas capacity which we identified as Building Block 2, qualify as part of the BSER to reduce emissions at regulated sources at length in the preamble for the proposed rule (79 Fed. Reg. 34,830, 34,878 – 34,892), the GHG Abatement Measures Technical Support Document (http://www2.epa.gov/sites/production/files/2014-06/documents/20140602tsd-ghg-abatement-measures.pdf),and the accompanying Legal Memorandum (Docket ID Number EPA-HQ-OAR-2013-0602-0419, pages 33-93). The EPA is currently reviewing the more than 4.3 million comments received on the proposal, including comments on the availability of transmission to deliver energy where there are dispatch changes, and will respond to the issues raised in those comments when we issue a final Clean Power Plan.

5) Currently, natural gas powered electricity generation is not available in Interior Alaska, and due to geographical challenges,, natural gas may not be an economical option for electricity generation in the near future. How much flexibility is EPA prepared to provide based on geographic challenges such as those faced in Interior Alaska?

The EPA's proposed state goals do not impose specific requirements on any individual source or sub-region. The proposed Clean Power Plan builds on what states are already doing to reduce carbon pollution from existing power plants. It does not require that the states actually use each of the building blocks as they develop their plans for meeting the state goal. Instead, it empowers the states to chart their own, customized path to meet their goals. Under the proposal, the states have a flexible compliance path that allows them to design plans sensitive to their needs, including considering the time it will take to put in place the necessary infrastructure. The proposal discussed the availability of new natural gas capacity at 79 FR 34857.

6) EPA's Legal Memorandum accompanying the Proposed Rule for existing plants states, "Central to our Best System of Emission Reduction (BSER) determination is the fact that the nation's electricity needs are being met, and have for many decades been met, through a grid formed by a network connecting groups of Electric Generating Units (EGUs) with each other and, ultimately, with the end users of

electricity... Through the interconnected grid, fungible products—electricity and electricity services—are produced and delivered by a diverse group of EGUs operating in a coordinated fashion in response to end users' demand for electricity." How does this rationale apply to Alaska? Please explain.

Along with the proposed rule, the EPA included in the docket a Legal Memorandum providing background for the legal issues raised by the rule. In addition to the preamble, that Legal Memorandum details the EPA's understanding, at the time of proposal, of the legal rationale for our proposed determination of BSER. That document can be found using Docket ID Number EPA-HQ-OAR-2013-0602-0419. The EPA is currently reviewing the more than 4.3 million comments received on the proposal, including the comments on the interconnected nature of the electric grid and comments on specific locations where there may be more localized needs, and will respond to the issues raised in those comments when we issue a final Clean Power Plan.

7) What consultation occurred with states during the rulemaking process? Were any State of Alaska officials involved in the drafting of the proposed rules?

The outreach to and response from the public on the Clean Power Plan has been unprecedented, including outreach to and feedback from stakeholders from all 50 states. EPA has met with and heard from both government and utility stakeholders in Alaska. More than 4.3 million comments have been submitted and EPA is examining and carefully considering all the issues raised in those comments.

8) Do you think the resources that will be spent in Alaska complying with the Proposed Rule on existing plants could be better spent helping our bush communities move away from expensive diesel generation and towards more cleaner and inexpensive options?

The proposed Clean Power Plan builds on what states are already doing to reduce carbon pollution from existing power plants. It does not require that the states actually use each of the building blocks as they develop their plans for meeting the state goal. Instead, it empowers the states to chart their own, customized path to meet their goals. Under the proposal, the states have a flexible compliance path that allows them to design plans sensitive to their needs.

9) Fairbanks is reliant on coal fired power. A recent University of Alaska study determined that coal fired technology is the only viable affordable option for Interior Alaska's electric generation. Fairbanks is also in a PM 2.5 nonattainment area. If our Interior coal plants shut down, or the rates increase even higher than they are already, more Fairbanks residents will begin heating their homes with wood stoves and further aggravate the PM 2.5 issue. Have you given any thought to how the EPA will help mitigate the social and economic impacts on communities if these rules are finalized? Has the EPA conducted any analysis on unrelated consequences of this Proposed Rule on existing plants, such as the PM2.5 issue?

The EPA's proposed state goals do not impose specific requirements on any individual source. The proposed Clean Power Plan builds on what states are already doing to reduce carbon pollution from existing power plants. It does not require that the states actually use each of the building blocks as they develop their plans for meeting the state goal. Instead, it empowers the states to chart their own, customized path to meet their goals. Under the proposal, the states have a flexible compliance path that allows them to design plans sensitive to their needs, including considering the time it will take to put in place the necessary infrastructure.

Consistent with statute, Executive Order, and OMB guidance, the EPA conducted a Regulatory Impact Analysis that shows the benefits and costs of illustrative scenarios states may choose in complying with the proposed Clean Power Plan. Because states have flexibility in how to meet their goals, the actions taken to meet the goals may vary from what is modeled in the illustrative scenarios. Specific details, including information about how costs and benefits are estimated are available in the RIA (http://www2.epa.gov/sites/production/files/20 1 4-06/documents/20 140602ria-clean-powerplan.pdf).

Senator Vitter

Focusing on NRDC Relationship with EPA

Under the Clean Air Act §307(d), EPA is required to post all written comments and documentary information received in the docket, including information obtained through emails, phone calls, and meetings with Agency officials. Documents obtained by the Committee pursuant to a request for communications regarding the ESPS and NSPS rules between EPA and NRDC reveal a significant amount of correspondence that EPA did not post to the rulemaking docket. While the requirement does grant the Agency discretion over what information is material to the rule, the fact more than a dozen phone calls and meetings on the rules were excluded from the docket raises questions over EPA's level of transparency in developing the rules.

1. Ms. McCabe, as you are aware, I submitted requests for documents on these rules last Congress. While I understand the Agency is still producing documents to the Committee, a review of those in the Committee's possession reveal a pattern of frequent meetings and phone calls between EPA and NRDC. Not only am I concerned by the increased access NRDC had to EPA officials developing these rules, but there is a real concern over a number of meetings and calls that EPA did not include in the rulemaking docket. Ms. McCabe, are you aware of such correspondence not being posted to the docket? Why do you think some correspondence with NRDC over others was excluded from the docket? Will you commit to correcting the docket?

Any rule we finalize will comply with all applicable statutory public participation requirements, including posting documents to the docket.

2. In one of the emails you released last fall as part of your investigation into EPA's relationship with NRDC. One email in particular is important given the fact that

many states are just going to refuse to implement a rule they view as illegal and an inappropriate usurpation of power.

ESPS requires states to submit a state implementation plan (SIP) for EPA's approval, which demonstrates how the state will meet emission goals. Under 111(d), EPA has the authority to issue a federal implementation plan (FIP) for states that do not submit a SIP or submit an unsatisfactory SIP. While the EPA has said ESPS encourages state flexibility in developing SIPs, evidence suggests EPA is being disingenuous and is inclined to issue a backstop FIP. An email obtained by the Committee reveals that the idea of a federal takeover of states through ESPS FIPs may have come from the NRDC. In the email, NRDC attorney Dave Hawkins advises senior EPA air official Joe Goffman how EPA can tamper with state compliance dates and issue backstop FIPs.

3. Ms. McCabe, documents obtained by the Committee suggests that NRDC helped develop the Agency's strategy for issuing a model FIP to circumvent state implementation challenges. [SHOW POSTER] Specifically, in June 2013—before the rule was proposed—NRDC attorney Dave Hawkins advised senior EPA air official Joe Goffman, "as long as the compliance date for the FIP 111(d) emission limits is a few years after the SIP submission deadline, it appears that EPA can promulgate backstop FIP limits even in advance of the June 2016 SIP submission date." Why was NRDC providing such detailed advice to EPA before the rule was even proposed? Prior to the email, had EPA considered issuing a model FIP? Did NRDC's advice have any bearing on the model FIP EPA is currently developing? Is EPA in fact planning to issue its model FIP before the SIP deadline?

The Clean Air Act provides for EPA to write a federal plan if a state does not put an approvable state plan in place. In response to requests from states and stakeholders since the proposed Clean Power Plan was issued, EPA announced in January 2015 that we will be starting the regulatory process to develop a rule that would set forth a proposed federal plan and could provide an example for states as they develop their own plans. EPA fully expects that, as contemplated by the Clean Air Act, states will want to submit their own plans, and will use that as an opportunity to tailor their plans to their specific needs and priorities. The agency expects to issue the proposed federal plan for public review and comment in summer 2015.

4. Ms. McCabe, I think EPA is delusional if the agency believes there isn't going to be a serious problem with a number of states refusing to implement the ESPS and put forward a state implementation plan. Has EPA begun developing a litigation strategy with NRDC to force compliance or otherwise enter into settlement agreements? And has NRDC, which is perhaps America's largest environmental law firm, discussed options for NRDC to help pay for energy price increases. In other words, NRDC is worth hundreds of millions of dollars, if they're so comfortable increasing energy prices on America's poor and elderly have they discussed with you options for using some of their endowment to help the consumers they plan on hurting

The EPA is not coordinating with outside organizations in the manner you suggest.

Social Cost of Carbon

EPA's regulatory impact analysis for ESPS is primarily based on climate benefits derived from the convoluted 2013 social cost of carbon (SCC) estimates, as well as of course the PM benefits that EPA's now infamous fake CIA agent John Beale worked on. You have made several requests, along with other members of Congress, for information on the Interagency Working Group (IWG) that developed the estimates. None of the Administration's responses have been fully responsive to such requests. There is still zero transparency over who participated and the extent of their participation.

1. Ms. McCabe, you may recall I previously asked whether or not you participated in the Interagency Working Group developing the social cost of carbon (SCC) estimates, and I know at that time your answer was no. I also know that despite Congressional requests for information, the SCC remains stuck in a black box. There is still zero transparency. And since we last spoke on this topic, the EPA proposed the ESPS—one of the most expansive and expensive regulations—which relies on climate benefits from the flawed and secretive SCC. That said, what was your role in developing the cost- benefit analysis for ESPS which relied on the SCC? Have you had any interaction with the SCC Interagency Working Group? Why have you not provided my office with the names and titles of those officials under your supervision in the Office of Air Radiation that have participated in the Interagency Working Group?

Consistent with the Office of Management and Budget's guidance, the SCC estimates are used in the EPA's analyses of regulations subject to benefit-cost analysis under E.O. 12866 and 13563 to estimate the welfare effects of quantified changes in carbon dioxide (CO2) emissions. The SCC estimates were applied in the benefit-cost analysis for the proposed Clean Power Plan in the same way they are for other EPA regulatory actions subject to E.O. 12866 and 13563.

As noted in the EPA's response to previous letters from you on this topic, EPA officials from both the Office of Policy (OP) and the Office of Air and Radiation (OAR) participated in the interagency SCC discussions, including technical staff (economists and climate scientists) from the National Center for Environmental Economics in OP and the Office of Atmospheric Programs in OAR. The EPA staff provided technical expertise in climate science and economics to the broader workgroup as needed. For example, the professional economic staff used the modeling input parameters developed by the interagency group and oversaw the primary modeling and calculations for both the 2010 and the 2013 SCC estimates. Consistent with the Administration's commitment to transparency, the EPA has, upon request, provided to researchers and institutions more detailed output than is presented in the 2010 or 2013 Technical Support Document (TSD), as well as instructions, input files, and model source code.

GAO completed a review of the process the Interagency Working Group (IWG) used to develop the SCC estimates and published a report in 2014, "Regulatory Impact

Analysis: Development of Social Cost of Carbon Estimates," that discusses the participating entities, and processes and methods the IWG used to develop the 2010 and 2013 SCC estimates. After interviews with scientists and officials who participated in the development of the SCC, along with reviews of relevant technical documents, the GAO concluded that the IWG (1) used consensus-based decision-making, (2) relied on existing academic literature and modeling, and (3) took steps to disclose limitations and incorporate new information by considering public comments and revising the estimates as updated research became available. The GAO also highlighted the various opportunities for public input on the SCC in general and the interagency estimates, including public comments received in response to numerous rulemakings. The GAO concluded that the level of documentation for this interagency exercise was equivalent to those from other comparable interagency exercises.

Finally, while I do not attend IWG meetings, I am aware that the Office of Management and Budget (OMB) recently responded to public comments received through OMB's solicitation for comments on the SCC. The OMB comment solicitation was conducted independently from, and in addition to, multiple opportunities for comment on individual agency rulemakings. As explained in the response document, after careful evaluation of the full range of comments, the IWG believes the SCC estimates continue to represent the best scientific information on the impacts of climate change available for incorporating the impacts from carbon pollution into regulatory analyses and continues to recommend their use until further updates can be incorporated into the estimates. Therefore, EPA will continue to use the current SCC estimates in the analysis of the Clean Power Plan.

<u>Technical Questions</u>

1. In his Presidential Memorandum directing the Agency to undergo this rulemaking process, President Obama explicitly directs EPA to take "into account other relevant environmental regulations and policies that affect the power sector" and to "tailor regulations and guidelines to reduce costs". In the event that a coal-fired power plant has invested hundreds of millions of dollars to comply with EPA rules such as the Mercury Air Toxics Standard and the Cross State Air Pollution Rule, how does EPA's Clean Power Plan ensure that such an entity will be able to meet its financial obligations due to these investments?

The EPA's proposed state goals do not impose specific requirements on any individual source. Instead, states have the flexibility to choose their own compliance pathways, including avoiding stranded assets. Following publication of the proposed rule, EPA published a Notice of Data Availability [79 FR 64543, October 30, 2014] that provided additional information on certain issues that had been consistently raised by a diverse set of stakeholders, including ideas about the glide path of emission reductions from 2020-2029 and other topics that have been identified as potentially related to the remaining asset value of existing coal-fired generation.

2. Beyond achieving a certain level of efficiency gains, there are no commercially

available technologies to reduce CO2 emissions from coal-fired power plants. According to EPA's regulatory impact analysis, the Clean Power Plan will increase electricity rates. For certain coal plants operating in organized electricity markets, this increased cost is likely to reduce plant production to the extent that alternative lower emitting sources of production are less expensive and hence will operate at higher utilization rates. Thus, the financial impact on the generating unit will be a combination of lower revenues associated with lower production and lower earnings associated with higher costs not being offset by higher sales revenues. As CO2 emission standard compliance costs increase, reductions in production will increase.

These increased costs will lead to different outcomes for certain coal-dominated entities, including rural electric cooperatives, municipals, and merchant power producers. Higher electricity costs will be either (1) borne directly by ratepayers, in the case of a cooperative or municipal; or (2) result in decreased financial operating margins, in the case of a generator dependent solely on the wholesale market for revenues. Do you agree with these conclusions? If not, please explain why. Please further explain how EPA plans to address these disproportionate impacts, and how a state in a SIP would be allowed to deal with them.

The EPA's proposed state goals do not impose specific requirements on any individual source. Instead, states have the flexibility to choose their own compliance pathways, including avoiding stranded assets and maintaining electric reliability. Consistent with statute, Executive Order, and OMB guidance, the EPA conducted a Regulatory Impact Analysis that shows the benefits and costs of illustrative scenarios states may choose in complying with the proposed Clean Power Plan. Because states have flexibility in how to meet their goals, the actions taken to meet the goals may vary from what is modeled in the illustrative scenarios. This assessment found that nationally, in 2030 when the plan is fully implemented, average electricity bills would be expected to be roughly 8 percent lower than they would been without the actions in state plans. That would save Americans about $8 on an average monthly residential electricity bill, savings they wouldn't see without the states' efforts under this rule. Specific details, including information about how costs and benefits are estimated are available in the RIA (http://www2.epa.gov/sites/production/files/20 1 4-06/documents/20 140602ria-clean-powerplan.pdf).

European Disaster Question

1. Fortunately last congress we had some really great witnesses that were able to testify on the state of climate science, and the fact that our climate always has been and always will be changing, as well as to the impacts policies similar to what EPA is trying to implement have had on the citizens and economies of European countries that have adopted similar requirements. Can you provide for me your thoughts on how Germany, Spain, France and the U.K. have benefited from their global warming polices and energy mandates? Specifically, can you walk me through how the changes in energy prices have impacted the poor and elderly as well as the economies and investment in those countries? And of Germany, Spain, France and the U.K., which ones do you think stand out as a good

model for what EPA wants to do with the ESPS and regulating CO2?

The EPA did not use any European country as a model in designing the Clean Power Plan.

Science Questions

1. Is carbon dioxide critical to the process of photosynthesis and life on earth?

Yes.

2. As EPA moves forward with regulating carbon dioxide will carbon dioxide be the first gas regulated under the Clean Air Act that humans exhale at a higher rate than they inhale?

No.

3. What percent of CO2 in the atmosphere is emitted by humans?

Approximately 30% of the CO2 level in earth's atmosphere today is a result of emissions caused by human activities, primarily the combustion of fossil fuels.

4. In earth's geologic history is their evidence that CO2 in the atmosphere has been higher than it is today?

Yes, though not for at least 800,000 years.

5. In 2009 Al Gore predicted "The entire north polar ice cap will be gone in 5 years." Did this prediction come true?

I am not familiar with the quote you mention. When referencing Arctic sea ice trends, the EPA relies on the major scientific assessments and standard sources like the National Snow and Ice Data Center. Arctic sea ice has continued to decline, at an average of 13% per decade in September over the satellite era. The Arctic sea ice minimum in September of 2012 was the lowest extent ever observed, at 49% below the 1979 to 2000 average.

6. Stephen Schneider, who authored The Genesis Strategy, a 1976 book warning that global cooling risks posed a threat to humanity, later changed that view 180 degrees when he served as a lead author for important parts of three sequential IPCC reports. In an article published in Discover, he said: "On the one hand, as scientists we are ethically bound to the scientific method, on the other hand, we are not just scientists, but human beings as well. And like most people, we'd like to see the world a better place, which in this context translates into our working to reduce the risk of potentially disastrous climatic change. To do that, we need to get some broad-based support, to capture the public's imagination.

That, of course, entails getting loads of media coverage. So we have to offer up scary scenarios, make simplified, dramatic statements, and make little mention of the doubts we might have. Each of us has to decide what the right balance is between being effective and being honest." Does EPA agree with these statements?

The EPA is committed to using sound science and data as the foundation for protecting human health and the environment. For climate change, we rely primarily on the scientific assessments of the U.S. Global Change Research Program (USGCRP), the United Nations Intergovernmental Panel on Climate Change (IPCC) and the National Research Council (NRC) of the National Academies. These assessments synthesize and assess research across the entire body of scientific literature, including consideration of uncertainty, in their development of key scientific findings.

7. Timothy Wirth, former U.S. Senator (D-CO) and former U.S. Undersecretary of State for global issues, at the first UN Earth Climate Summit Rio de Janeiro stated: "We have got to ride the global warming issue. Even if the theory of global warming is wrong, we will be doing the right thing in terms of economic policy and environmental policy." Does EPA agree with these statements?

I am not familiar with the statement you mention. That said, as the National Research Council of the National Academy of Sciences has stated, "there is a strong, credible body of evidence, based on multiple lines of research, documenting that climate is changing, and that these changes are in large part caused by human activities."

8. Speaking at the 2000 U.N. Conference on Climate Change in the Hague, former President Jacques Chirac of France explained why the IPCC's climate initiative supported a key Western European Kyoto Protocol objective: "For the first time, humanity is instituting a genuine instrument of global governance, one that should find a place within the World Environmental Organization which France and the European Union would like to see established." Does EPA support reaching a treaty in Paris so that there can be a "global governance" of U.S. economic policy?

No.

9. On November 14, 2010, Ottmar Edenhofer, a U.N. IPCC Official, stated, "First of all, developed countries have basically expropriated the atmosphere of the world community. But one must say clearly that we redistribute de facto the world's wealth by climate policy. Obviously, the owners of coal and oil will not be enthusiastic about this. One has to free oneself from the illusion that international climate policy is environmental policy. This has almost nothing to do with environmental policy anymore..." Does EPA agree with these statements?

I am not familiar with the statement you mention. The EPA's analysis of the Clean Power Plan proposal makes clear that there is a significant role for coal and natural gas in our electricity generating mix going forward.

10. Attorney David Sitarz, a key editor of the UN's Agenda 21 document, stated at the UN's 1992 Conference on Environment and Development in Brazil, "Effective execution of Agenda 21 will require a profound reorientation of all human society, unlike anything the world has ever experienced—a major shift in the priorities of both governments and individuals and an unprecedented redeployment of human and financial resources. This shift will demand that a concern for the environmental consequences of every human action be integrated into individual and collective decision-making at every level." Does EPA agree with these statements?

I am not familiar with the statement you mention. The proposed Clean Power Plan builds on what states are already doing to reduce carbon pollution from existing power plants.

Other

1. Section 111 of the Clean Air Act provides EPA the authority to regulate new and existing "stationary sources" which it defines under subsection (a) as "any building, structure, facility, or installation which emits or may emit any air pollutant". That seems pretty straight forward, and yet you propose a rule for existing sources that would force states to significantly increase renewable — which do not emit any air pollutants. What percent of the claimed reductions under your proposed rule does EPA anticipate will come from increases in renewable energy? Given the plain meaning of the statute, how can you set a standard that in essence relies on such an increase in renewable power — a non-emitting source of electricity not covered by Section 111?

Along with the proposed rule, the EPA included in the docket a Legal Memorandum providing background for the legal issues raised by the rule. In addition to the preamble, that Legal Memorandum details the EPA's understanding, at the time of proposal, of the legal issues in the proposal. That document can be found using Docket ID Number EPA-HQ-OAR-2013-0602-0419. The EPA is currently reviewing the more than 4.3 million comments received on the proposal, including the comments on the issues addressed in the legal memorandum, and will respond to the issues raised in those comments when we issue a final Clean Power Plan.

2. Section 111(d), the authority for the Clean Power Plan, regulates existing sources. However, your proposed rule seeks comment on including new sources in a state's 111(d) plan. What new sources do you think should be included in a state's plan for existing sources. Isn't it true that Section 111 has a separate subsection for the regulation of new sources under subsection (b) --- not (d). Why do you think you have the authority to regulate new sources under section 111(d)?

Along with the proposed rule, the EPA included in the docket a Legal

Memorandum providing background for the legal issues raised by the rule. In addition to the preamble, that Legal Memorandum details the EPA's understanding, at the time of proposal, of the legal issues in the proposal. That document can be found using Docket ID Number EPA-HQ-OAR-2013-0602-0419. The EPA is currently reviewing the more than 4.3 million comments received on the proposal, including the comments on the issues addressed in the Legal Memorandum, and will respond to the issues raised in those comments when we issue a final Clean Power Plan.

3. Your proposed rule for NEW units would require CCS for new coal units despite the fact that CCS has not been adequately demonstrated and is not considered to be commercially viable. In fact a recent DOE authorized study just concluded in January that "CCS does not yet meet this best system of emission reduction (BSER) standard, because it has not yet been adequately demonstrated." (pg 103 of http://insideepaclimate.com/sites/insideepaclimate.com/files/documents/jan2015/epa2015_0144.pdf) What will happen to your existing plant rule if your new rule is overturned in Court? Do you believe you have the authority under Section 111 to issue an existing plant rule if your rule for new units is vacated?

Along with the proposed rule, the EPA included in the docket a Legal Memorandum providing background for the legal issues raised by the rule. In addition to the preamble, that Legal Memorandum details the EPA's understanding, at the time of proposal, of the legal issues in the proposal. That document can be found using Docket ID Number EPA-HQ-OAR-2013-0602-0419. The EPA is currently reviewing the more than 4.3 million comments received on the proposal, including the comments on the issues addressed in the Legal Memorandum, and will respond to the issues raised in those comments when we issue a final Clean Power Plan.

4. There are many coal plants out there that have just spent millions of dollars to comply with the MATS rule. And yet, under your proposed rule, these units will likely be allowed to run only at very low capacity levels that make the units uneconomical. Has there ever been a major rule making by EPA where the standard was not based on specific control technologies but rather a limit on how often a unit can be run? Do you believe the CAA allows you to establish regulations that can force the closure of existing coal plants by establishing de-facto limits on how often they can run?

The EPA's proposed state goals do not impose specific requirements on any individual source. The proposed Clean Power Plan builds on what states are already doing to reduce carbon pollution from existing power plants. It does not require that the states actually use each of the building blocks as they develop their plans for meeting the state goal. Instead, it empowers the states to chart their own, customized path to meet their goals.

5. If you are forced to issue a federal implementation plan, which entities do you have

enforcement authority over in the context of this rule making? Do you believe EPA can enforce renewable energy targets or demand side management programs in a state that fails to submit an implementation plan? Does your authority extend to the states directly or just to the existing stationary sources as defined by the Clean Air Act? If your answer is that you are working through these issues now—how EPA can propose a rule without knowing the limits of its own regulatory authorities?

Under a state plan approved under Clean Air Act (CAA) §111(d), all measures that a State adopts into the plan and submits to EPA for approval, and that EPA approves, become federally enforceable. Under the proposed rule, the states have significant discretion in determining what types of measures to adopt and submit to EPA for approval. The EPA will approve a state plan if it meets the state goal. EPA discussed the concept of federal enforceability, including the availability of citizen suits, in the preamble to the proposed rule (79 Fed. Reg. 34,830, 34,902-34,903) and the accompanying legal memorandum (Docket ID Number EPA-HQ-OAR-2013-0602-0419, PAGE 4) and the agency will review any comments we receive on this issue.

United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

October 8, 2015

The Honorable Gina McCarthy
Administrator
Environmental Protection Agency
1200 Pennsylvania Ave, NW
Washington, DC 20460

Dear Ms. McCarthy:

On behalf of the Senate Environment and Public Works Subcommittee on Clean Air and Nuclear Safety, we write to provide you notice that we intend to invite a witness representing the Environmental Protection Agency (EPA) to testify before a joint subcommittee hearing with the Senate Foreign Relations Subcommittee on Multilateral International Development, Multilateral Institutions, and International Economic, Energy, and Environmental Policy on Wednesday, October 20, 2015, beginning at 2:45 p.m. in Room G-50 of the Dirksen Senate Office Building. The purpose of the hearing is to conduct oversight of the ongoing international climate negotiations and examine the role that domestic environmental policies play in any final agreement.

The EPA's regulatory actions make up a substantial portion of the president's Intended Nationally Determined Contribution (INDC) that was submitted to the United Nation's Framework Convention on Climate Change earlier this year. Proposed regulatory actions in the INDC that fall under the purview of EPA include: Fuel economy standards for light and heavy duty vehicles, Significant New Alternatives Program (SNAP) for certain hydrofluorocarbons (HFCs), carbon standards for new and existing power plants, and methane standards for landfills and the oil and gas sectors. The agency's much heralded Clean Power Plan is the centerpiece of the president's domestic climate agenda, which you previously described as an important "signal" to the world that the U.S. is serious about addressing climate change.

In the words of the INDC, one of its primary purposes is to provide "information to facilitate the clarity, transparency, and understanding of the contribution." Despite this claim, many questions remain, which the administration has yet to make any effort to answer. The Environment and Public Works Committee held an initial hearing related to the international climate negotiations in July and heard from a variety of stakeholders who provided substantive analyses of the INDC and overwhelmingly concluded that even under the best of circumstances, the president's plan falls short of meeting its intended goal. Such a conclusion has led to many more questions that can only be definitively answered by the administration.

You said it best before a Council on Foreign Relations group earlier this year, "[W]here environment is concerned it's hard to know where domestic policy ends and where foreign policy

actually begins."[1] We completely agree. Given EPA's much heralded leadership in domestic climate initiatives, your participation as a witness for the October 20th hearing is vital to complete comprehensive and robust oversight of the president's domestic and international climate change efforts, which are rooted in the subcommittees' jurisdictional responsibilities. Mr. Todd Stern from the U.S. State Department will join the EPA witness on the panel.

The subcommittee intends to send the invitation letter with specifics on testimony and committee requirements at the usual time of one week prior to hearing with the usual public notice of the hearing. However, we believe it is important to provide notice of that invitation earlier and formally with this letter.

Sincerely,

James M. Inhofe
Chairman

Shelley Moore Capito
Chairman
Subcommittee on Clean Air and
Nuclear Safety

[1] Gina McCarthy speech at Council on Foreign Relations, "Bridging U.S. Environmental and Foreign Policy," March 11, 2015, available at http://www.cfr.org/environmental-policy/bridging-us-environmental-foreign-policy/p36249

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OCT 13 2015

OFFICE OF
CONGRESSIONAL AND
INTERGOVERNMENTAL
RELATIONS

The Honorable James Inhofe
Chairman
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for your October 8, 2015, letter regarding an upcoming hearing that the Subcommittee on Clean Air and Nuclear Safety is planning on holding jointly with the Senate Foreign Relations Subcommittee on Multilateral International Development, Multilateral Institutions, and International Economic, Energy, and Environmental Policy on the topic of international climate negotiations. The Administrator asked that I respond to your letter.

It is my understanding that the Senate Foreign Relations Subcommittee has confirmed Todd Stern from the U.S. Department of State as a witness for this hearing. Mr. Stern, as the Special Envoy for Climate Change, is in the best position to describe the Administration's efforts with regard to the international climate negotiations. As the Administrator described in your recent phone call, and as reiterated in e-mails and phone conversations with your staff, the agency cannot speak to the full suite of domestic policies that are being considered in these negotiations and is not the party responsible for developing the total emissions reduction numbers for the U.S. It is my understanding that you are seeking a witness who can speak to the development of the emission reduction numbers, and given that neither the entirety of the domestic climate policies, nor the development of the total number are within the purview of the agency, I respectfully continue to assert that the agency does not have a witness who can speak to the issues that are the topic of this hearing.

As previously indicated, while some of the agency's actions are in fact significant parts of the domestic climate policies, they are not the entirety. The agency has worked with the Committee to provide information on each of the policies within our purview, including most recently having the Acting Assistant Administrator for Air and Radiation testify before your Committee earlier this month at a hearing entitled "Economy Wide Implications of President Obama's Air Agenda" which included, among other Clean Air Act actions, a focus on the Clean Power Plan, a centerpiece of the agency's climate actions.

The agency takes seriously its obligations to testify before Congress as evidenced by the 33 hearings the agency has provided a witness for this year, including eight hearings before your Committee, three of which were with the Administrator as the witness. In fact, throughout the 114th Congress the agency has worked well with you and your staff to accommodate all the Committee requests for agency testimony. As such, the agency has provided a witness to your Committee each time one has been requested.

However, we feel strongly that it is not appropriate for the agency to testify on topics outside of our expertise and purview as is the case with this particular hearing.

Again, I want to reiterate that the agency holds the oversight functions of Congress in high regard and is pleased to work with the Committee on these and other matters; however, the agency is not the entity within the Administration who can speak to the topic of this particular hearing.

Sincerely,

Laura E Vaught

Laura Vaught
Associate Administrator

cc: The Honorable Barbara Boxer
Ranking Minority Member

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OCT 2 3 2015

THE ADMINISTRATOR

The Honorable James Inhofe
Chairman
Committee on Environment and Public Works
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

I am pleased to support the charter of the Pesticide Program Dialogue Committee in accordance with the provisions of the Federal Advisory Committee Act, 5 U.S.C. App. 2. The Pesticide Program Dialogue Committee is in the public interest and supports the U.S. Environmental Protection Agency in performing its duties and responsibilities.

I am filing the enclosed charter with the Library of Congress. The Pesticide Program Dialogue Committee will be in effect for two years from the date it is filed with Congress. After two years, the charter may be renewed as authorized in accordance with Section 14 of FACA (5 U.S.C. App. 2 § 14).

If you have any questions or require additional information, please contact me or your staff may contact Christina Moody in EPA's Office of Congressional and Intergovernmental Relations at moody.christina@epa.gov or (202) 564-0260.

Sincerely,

Gina McCarthy

Enclosure

United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

November 20, 2015

The Honorable Gina McCarthy
Administrator
Environmental Protection Agency
U.S. EPA Headquarters – William J. Clinton Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Administrator McCarthy,

On September 18th, the Environmental Protection Agency (EPA) proposed a suite of regulations, as part of the Administration's Climate Action Plan, intended to further reduce volatile organic compounds (VOC) and methane emissions from the oil and gas industry. This is a vital industry to our economy, and our recent energy renaissance has provided significant benefits to the American people, while cementing greater energy security. Despite this rapid growth in US oil and gas production, emissions from the sector have continued to decrease, falling for three straight years according to EPA data in the 2014 Greenhouse Gas Reporting Program. Yet, EPA appears to have initiated a regulatory process that could fundamentally undermine this progress and do so on a politically-driven timeline that does not adequately allow for the opportunity to fully consider all of the federal regulatory actions on methane that have been announced. It is of critical importance to avoid unnecessary and detrimental impacts to the vital oil and gas sector when, by EPA's own data, this sector constitutes a very small fraction of total U.S. greenhouse gas emissions.

I understand that EPA has granted a very limited extension to the comment period for this suite of rules. The additional time that you have provided is insufficient to simultaneously review the four rules that directly affect the industry, EPA's voluntary program (the details for which were finally released two weeks ago), and the anticipated BLM rules. As such, I request that the EPA further extend the comment period to 60 days (an additional 43 days beyond the December 4th comment deadline) to allow for comprehensive comments from all interested stakeholders.

On other rules with commensurate interest and impacts, such as the original Subpart OOOO rule and the 2015 power plant rules (Clean Power Plan and EGU NSPS Subpart TTTT), EPA granted a 30 day extension and a 60 day extension respectively allowing a total comment period of 90 to 120 days. In both of these examples extensions were given for a single rule, and yet in this instance, stakeholders are forced to provide comments on four related proposed rules that have far reaching implications in a mere 77 days. Plainly stated, this is an insufficient amount of time for stakeholders to appropriately review and respond to the proposed rules.

Along with the regulations EPA has proposed, the Bureau Land of Management (BLM) intends to propose new methane regulations that may cover the very same sources as the EPA's proposed methane rules. Stakeholders should have the opportunity to review and comment on these rules concurrently. Multi-agency rules have the potential to create significant uncertainty for the future operations of a critical domestic industry due to requirements that are often times conflicting, misaligned, and duplicative. The potential interaction between the EPA and BLM proposals deserves thorough analysis and comprehensive feedback from stakeholders, which can only be possible if these rules are considered at the same time.

To reiterate, EPA should allow a 60 day comment period extension (i.e., an additional 43 days beyond the current 17-day extension to December 4th) to assure adequate time to prepare well-reasoned comments and provide a minimum of 30 days overlap between EPA's and BLM's rule comment periods. In the event that a full 30 days overlap with the proposed BLM rule is not secured during this period, EPA should re-open the proposed rule to allow this overlap in a new 30-day comment period. This will provide stakeholders an appropriate opportunity to contemporaneously review the proposals and provide meaningful comments. Without a comment extension and adequate overlap, I remain greatly concerned that EPA and BLM are pursuing dual processes that would inevitably stifle production, impose a significant compliance burden, and negatively impact American workers and families.

Thank you for your consideration of this request. I look forward to your reply.

Sincerely,

James M. Inhofe
Chairman

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DEC - 3 2015

OFFICE OF
AIR AND RADIATION

The Honorable James M. Inhofe
Chairman
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for your letter of November 20, 2015, to U.S. Environmental Protection Agency Administrator Gina McCarthy requesting an extension of the comment period for the proposed Clean Air Act rules and draft guidance to reduce emissions of smog-forming volatile organic compounds (VOCs) and greenhouse gases, most notably methane, from the oil and natural gas industry. The Administrator asked that I respond on her behalf.

As you know, methane has a much greater global warming potential than carbon dioxide and accounts for about 10 percent of all greenhouse gas (GHG) emissions resulting from human activity in the United States. The Obama Administration is committed to addressing this source of GHG emissions, and on August 18, 2015, the EPA proposed, and posted to its website, a suite of commonsense requirements for the oil and gas sector that together will help combat climate change, reduce air pollution that harms public health, and provide greater certainty about Clean Air Act permitting requirements for the oil and natural gas industry. Together, these cost-effective requirements will reduce emissions from this rapidly growing industry, helping ensure that development of these energy resources is safe and responsible.

The proposed rules and draft guidance were the outgrowth of more than a year of public engagement that began with five technical white papers the agency issued in April 2014 for peer and public review. The agency noted at that time that it would use those papers, along with the input received from peer reviewers and the public, to determine how to best address additional emissions of volatile organic compounds and greenhouse gases from the sources covered in the papers. The EPA received more than 43,000 public comments on the white papers.

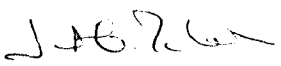
Drawing on the technical white papers and the comment and input we received in response, the Administration on January 14, 2015 announced a strategy to address methane and VOC emissions from the oil and gas industry to ensure continued, safe and responsible growth in U.S. oil and natural gas production. The strategy outlined the steps the Agency planned to take to reduce methane pollution from new sources in this rapidly growing industry, reduce VOCs from existing sources in areas that do not meet federal ozone health standards (many controls to reduce VOCs also reduce methane as a co-benefit), and build on work that states and industry are doing to address emissions from existing sources elsewhere. All of this information demonstrates that technology is now available that can significantly reduce emissions of methane and VOCs from oil and gas activities.

The proposed rules and draft guidance announced in August follow the steps outlined in the strategy and were developed with significant input, through meetings with the regulated industry, nongovernmental organizations, and a structured outreach process with state, local and tribal air agencies that volunteered to participate. The EPA has continued outreach since announcing the proposed rules and draft guidance on August 18, 2015. In the more than 100 days since the EPA announced the proposals, we have had substantive conversations with members of the regulated community and other stakeholders that have given us valuable input on all four EPA actions, and we held hearings in Dallas, Denver and Pittsburgh to hear comments from the public on the proposals. On November 3, 2015, the EPA announced that we were extending the comment period on the proposed rules to December 4, 2015. To date, we have received more than 460,000 public comments on the proposed New Source Performance Standards, including more than 17,000 unique comments.

Similarly, the EPA followed a lengthy process of stakeholder review to develop the voluntary Methane Challenge Program, collaborating with partner companies and stakeholders through annual workshops, stakeholder meetings and events, and by making program proposals and technical materials available for stakeholder feedback. We released an initial draft framework for an enhanced voluntary program in the spring of 2014, referred to at that time as Gas STAR Gold. Based on helpful input from oil and gas companies and other stakeholders, EPA revamped the proposed program to incorporate additional flexibility, resulting in the Methane Challenge proposal that was released for stakeholder feedback in July 2015. The EPA will be considering all feedback received on this proposal as we finalize the program framework by the end of 2015.

In light of these extensive opportunities to provide input on these proposals, the December 4, 2015 comment deadline will remain in place. Again, thank you for your interest in these important rulemakings. If you have further questions, please contact me, or your staff may contact Kevin Bailey in the EPA's Office of Congressional and Intergovernmental Relations at bailey.kevinj@epa.gov or (202) 564-2998.

Sincerely,



Janet G. McCabe
Acting Assistant Administrator

United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

February 24, 2015

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Ave., NW (1101A)
Washington, D.C. 20460

Dear Administrator McCarthy:

On behalf of the Senate Committee on Environment and Public Works, we would like to thank you for testifying before the Committee on Wednesday, February 4, 2015. The committee greatly appreciates your attendance and participation in this hearing.

In order to maximize the opportunity for communication between you and the Committee, follow-up questions have been submitted by the members. We ask that you respond to each member's request in a separate typed document. To comply with Committee rules, please e-mail a copy of your responses to Elizabeth_Olsen@epw.senate.gov or deliver one hard copy within 14 days after the date of this letter. Responses should be delivered to the EPW Committee at 410 Dirksen Senate Office Building, Washington, DC 20510. Due to security restrictions, only couriers or employees with government identification will be permitted to bring packages into the building.

If you have any questions about the requests or the hearing, please feel free to contact Laura Atcheson, Counsel on the Committee's Majority staff at (202) 224-7844, or Jason Albritton, Senior Policy Advisor on the Committee's Minority staff at (202) 224-1914.

Sincerely,

Barbara Boxer
Ranking Member

James M. Inhofe
Chairman

Environment and Public Works WOTUS Hearing
"Impacts of the Proposed Water of the United States Rule on State and Local Governments"
February 4, 2015
Follow-Up Questions for Written Submission to EPA Administrator McCarthy

Chairman Senator Inhofe

1. Please provide details on the resources, staffing, and procedures that will be utilized in reviewing the nearly 1 million comments received on the proposed waters of the United States rule. You promised to carefully consider these comments, yet also stated an intention to have the rule finalized in the spring of 2015. Taken with a 2-month interagency review period, this leaves 50-60 working days to review millions of pages of comments. How does EPA plan to complete such an expedited review?

2. When does EPA anticipate having all of the comments posted for public review? Currently only a small percentage of the comments have been posted.

3. You have stated that the rule narrows what is considered jurisdictional. What are you using as a baseline? Keep in mind that using previous rules rather than the 2008 Guidance would be misleading, because important elements of these have been struck down by subsequent court decisions.

4. You pledged to correct/tweak many parts of the rule during the recent Senate Committee on Environment and Public Works hearing on the proposed rule. However, as you stated, these issues are very complicated and difficult to address. Will you commit to subjecting the revised rule to a public notice and comment period?

5. Municipal Separate Storm Sewer Systems ("MS4s") are permitted as "point sources" by EPA and states under the CWA Section 402 National Pollutant Discharge Elimination System ("NPDES") program. That is, MS4 owners and operators must obtain Section 402 permits for pollutant discharges from MS4s into WOTUS. Moreover, EPA regulations provide that the boundaries of MS4 systems – and all of the component ditches, drains, pipes, curbs, gutters, and outfall points that comprise these systems – should be delineated and mapped such as through the use of GIS technologies. Given that MS4 discharges are already subject to exhaustive NPDES permitting requirements shouldn't these mapped and identified storm sewer systems – and all of their component parts – be excluded from WOTUS coverage?

6. EPA and the Army Corps regulations have long held that "waste treatment systems" are excluded from WOTUS coverage. See 40 C.F.R. § 122.2 (exclusions from WOTUS definition at subsection (b)(1)). MS4s treat, store, and recycle municipal and industrial

pollutants that are present in stormwater flows, before such pollutants are discharged into WOTUS. In EPA's views, are MS4s considered "waste treatment systems"? If so, shouldn't MS4s thus be captured by the "waste treatment system" exemption to WOTUS? Do the agencies consider untreated stormwater that enters into and travels through an MS4 a "waste"?

7. When an industrial activity results in a discharge into an MS4, EPA has "always addressed such discharges as discharges through [MS4s] as opposed to 'discharges to waters of the United States' ...." See Preamble to Phase 1 Rule, 55 Fed. Reg. 47,900, 47,997 (Nov. 16, 1990) (emphasis supplied). Therefore, shouldn't Section 402-permitted MS4s and their component parts be exempt from WOTUS coverage?

8. EPA's economic analysis of the proposed rule indicates that the rule will "not have an effect on annual expenditures" associated with development of state water quality standards, monitoring and assessment of water quality, and development of total maximum daily loads. Given that even by EPA's own estimate the rule will expand the current scope of federal jurisdiction, how do you assume that states will be able to expand such costly CWA programs at no expense?

9. EPA's economic analysis of the proposed rule indicated that the rule would "be cost neutral or minimal" with respect to Section 402 discharge permits for industrial operations. Given that by EPA's own estimate the rule will expand the current scope of federal jurisdiction, as well as industry's clearly stated concerns that the rule will bring on-site waters under federal oversight, how will this rule be "cost neutral" for industrial operations?

10. For the first time ever, your rule codifies CWA jurisdiction over on-site water management features such as ditches. The broad language in the rule could also easily be read to encompass other features on industrial sites that are not currently jurisdictional, such as settling ponds and basins. Why did your Agency fail to consider the additional costs added to the regulated public if on-site water management features – designed to ensure any discharges into downstream water meet environmental standards – are now themselves federally protected waterways under the CWA?

11. As you have heard from multiple entities, the broad overlapping definitions in the rule could bring a number of additional waters – including waters at industrial sites – under federal jurisdiction despite the intentions of the Agency. How do you intend to address these legitimate concerns in the final rule?

12. EPA has stated that it does not intend to modify or in any way limit any of the current exclusions from CWA jurisdiction, including the waste treatment system exclusion. Is this true?

13. If EPA – who is not the permitting authority in the case of Section 404 - can at any time retroactively veto the duly authorized specification of a disposal site, can it really be said that CWA Section 404 permits are *ever* final?

14. In 1972 during deliberations on the Clean Water Act in Congress, Senator Muskie noted that there are three essential elements to the Clean Water Act -- "uniformity, finality, and enforceability." Do you agree that finality is an important consideration for permits? How do the assertions made by EPA regarding the scope of its authority under Section 404 comport with the notion of permit finality?

15. Without any discernible or objective criteria governing EPA's claimed authority under Section 404(c), EPA's retroactive revocation of a lawfully issued Section 404 permit has destroyed the essential element of permit uniformity. What impact do you think EPA's actions will have on investment in U.S. property and natural resource development?

16. EPA's internal documents have stated that preemptive 404 actions, such as those taken with respect to the Pebble Mine in Alaska, could serve as a means of "watershed planning." If EPA is granted the authority to undertake such unilateral watershed planning, what would be the impacts on states?

17. Under the proposed rule, EPA and the Corps are suggesting that the movement of wildlife, including birds between one water and another, or the reliance by such species on a particular water within a watershed for any part of the species' life cycle, can be used to identify when waters are connected for purposes of asserting federal jurisdiction. Can you explain how this is different from the migratory bird rule struck down in SWANCC?

18. The proposed rule will make all perennial, intermittent, and ephemeral tributaries – including most streams and ditches and many dry washes – automatically jurisdictional. In connection with a hearing on the proposed rule by the House Science Committee, EPA released some USGS maps that show 8.1 million miles of intermittent, perennial and ephemeral tributaries, without even counting the ditches and dry washes. By contrast, EPA's latest National Water Quality Inventory Report to Congress says that State 305(b) reports identify only 3.5 million miles of federally jurisdictional "waters of the United States" nationwide under current regulations. Given that the preamble of the proposed rule indicates that USGS maps can be used to help identify jurisdictional waters, can you explain whether the additional 4.6 million stream miles reflected on the USGS maps released to the House Science Committee will not be treated as jurisdictional once the proposed rule is finalized? [Source: U.S. Environmental Protection Agency, Office of Water, National Water Quality Inventory: Report to Congress (January 2009)].

19. Today electric utilities, other energy facilities, and manufacturing facilities (often located in floodplains and riparian areas) design complex systems to manage and direct/divert water, stormwater, and waste on site so they can use the land and meet environmental requirements under federal and state law. These systems typically include ditches and canals that take water and waste to impoundments and treatment facilities and directly flow around and away from the facility. Only if the facilities end up discharging to a navigable water or adjacent wetland would they need to obtain Clean Water Act permits to meet water quality requirements at the point of discharge. The proposed rule would appear to make many of these ditches and impoundments themselves jurisdictional, requiring companies to meet water quality standards in the ditches and impoundments themselves rather than solely in downstream navigable waters and wetlands. EPA has long recognized that waste treatment systems are exempt from NPDES permit requirements and that water withdrawn for human use is not "waters of the United States." In keeping with these positions, does EPA agree that purpose-built water and waste management, collection, and diversion systems, including their ditches and impoundments, are not federally jurisdictional?

20. EPA, the Corps, and the regulated community rely on nationwide permits under Sections 402 and 404 to authorize discharges to jurisdictional waters without the need for individual permits, which take much longer and cost much more to obtain. This has been an especially important tool for energy infrastructure projects. Today, the use of a nationwide permit is subject to a small acreage limitation affected by "single and complete" projects, which are sections of projects that affect such waters. The proposed rule appears like it will make it more difficult to use nationwide permits by making it harder to qualify for them. How would EPA and the Army Corps ensure that most or all projects that now qualify for NWPs would continue to do so?

Ranking Member Senator Boxer

1) Ms. McCarthy and Ms. Darcy, you have taken important steps to solicit public and stakeholder input as part of the rulemaking process. For example, I understand that the comment period was extended twice and lasted over 200 days, which seems like a long period of time compared to most rulemakings. Is this correct?

    a. I also understand EPA and the Corps have conducted significant outreach beyond the formal comment period. Can you also elaborate on the types of outreach conducted for this rule?
    b. How will EPA and the Corps incorporate the feedback you have received as you work to prepare a final rule?

2) The Clean Water Act broadly protected small streams and isolated wetlands for nearly 25 years until the *SWANCC* case in 2001. Can you tell the Committee whether the proposed

Clean Water rule covers more waters than were protected prior to the SWANCC decision in 2001?

a. Were businesses in this country able to operate prior to 2001 when the Supreme Court narrowed the scope of the Act?

3) Ms. McCarthy, many of my colleagues choose to focus on perceived overreach and exaggerated costs of the proposed rule without discussing the value of providing clean water for our families and businesses.

Can you elaborate on some of the benefits of the proposed rule?

4) Ms. McCarthy, in administering landmark laws, like the Clean Water Act, it is important that Federal agencies follow the best available science. Can you expand on the science that was used to develop the rule and whether the protections included in the rule are supported by science?

Senator Wicker

1) Under your proposed rule; all waters in a flood plain are regulated, not just wetlands. So, under your rule you could be expanding jurisdiction to reach standing water in farmers' fields.

2) Will you commit to me that the final rule will not apply to "all water" in a flood plain or riparian area or "all water" that might flow over the land or that might move through the ground?

3) Please respond to concerns expressed to me by members of the Council of International Shopping Centers in Mississippi that the proposed rule broadens the scope of the Clean Water Act beyond statutory and constitutional limits established by Congress and affirmed by the Supreme Court. Specifically, uncertainty is created by allowing certain features to be considered jurisdictional based on their relationship to "impoundments" while leaving "impoundment" undefined; and the reliance on the confusing concept of ordinary high water mark as the key identifier for tributaries.

4) Please provide definitions and respond to the concern by the International Council for Shopping Centers that the rule leaves many concepts vague and undefined such as "impoundment," "floodplain," "riparian area" and "shallow subsurface hydrologic connection."

Senator Sullivan

1) The EPA's economic analysis of the proposed rule says that it would result in a 3% increase in jurisdictional waters nationwide. Does the EPA have an idea of how much of that would be found in Alaska?

2) Will tundra with underlying permafrost be considered jurisdictional under the proposed rule?

3) Is permafrost itself jurisdictional under the proposed rule? If so, what is the significant nexus between permafrost and a navigable water, interstate water, or territorial sea?

4) Are mountaintops that are covered in snow pack, or glaciers jurisdictional under the proposed rule?

5) Are alpine muskeg peat bogs jurisdictional under the proposed rule?

6) Are forested wetlands on steep slopes that do not have a traditional hydrological connection (defined bed, bank or ordinary high water mark) jurisdictional?

7) Businesses need fair and consistent permitting. However, clarity is not necessarily uniformity. Permafrost, tundra, muskegs, boreal forest spruce bogs, glaciers, and massive snowfields are features unique to Alaska and are absent in the vast majority, if not the entirety, of the rest of the U.S. Would you be willing to tailor the rule to take into account regionally specific characteristics?

8) The EPA has stated a number of times, including at the hearing, that ditches are excluded from jurisdiction under the proposed rule. A closer read of the proposal lists a number of criteria a ditch must meet in order to be excluded from jurisdiction. Do you envision that some ditches located on residential and commercial properties will meet these criteria?

9) Do you think that you have adequately complied with Executive Order 13132, which requires consultation with states for rulemakings that have "substantial direct effects on the states?"

10) In your view, will this proposal result in fewer citizen lawsuits?

11) What assurances can you provide the public, state and local governments, tribes, and regulated industry, that this rule will not cause skyrocketing costs of compliance, including mitigation costs?

12) Even if EPA does not intend to regulate waters which may be interpreted as newly jurisdictional, how can small landowners avoid eventual litigation brought against them due to these wide interpretations?

13) Section 101b of the Clean Water Act clearly states, "It is the policy of Congress to recognize, preserve, and protect the *primary* responsibilities and rights of the states to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." Why was the State of Alaska treated as nothing more than another contributor to the public comment period?

14) How do you think this proposed rule will impact the ability of state and local governments to exercise their authority with respect to land use management and planning?

15) All activities that will potentially affect newly jurisdictional waters will need to be approved by the Corps, and will be subject to EPA veto. Do you think the rule confers upon the EPA expansive control over land use and economic development decisions traditionally reserved for state and local governments?

16) How will the proposed rule impact the ability to create critical infrastructure that requires 404 permits?

17) The proposed rule is based on the Connectivity Study, which was itself developed without consultation with the states, local or tribal governments, or industry. The report lacks regional examples, including for Alaska. How can EPA rely on such generalized information?

18) By some estimates Alaska has 65% of the country's wetlands and the majority of these are dependent on continuous or discontinuous permafrost. Why didn't the Connectivity report include any maps or illustrations of Alaska?

19) Why did the EPA Science Advisory Board convened to look at the Connectivity Report only include academics and not a single regulatory expert or scientist from a state government?

20) Writing such a broad rule that applies nationally is certainly a difficult task. Wouldn't the EPA have benefitted from additional assistance from state regulatory experts and those with intimate knowledge of specific watersheds and the unique hydrology and geographic features of the different regions of the country?

21) Under the proposed rule, landowners with properties containing newly jurisdictional waters may experience may decrease in property value. Has EPA considered how the rule will affect property values?

22) Since the rulemaking was drafted before completion of the Connectivity Study, upon which it is based, how was there a meaningful opportunity to comment on the proposed rule provided?

Senator Vitter:

1) In light of EPA's actions with respect to the Bristol Bay and Pebble mines incidents, do you believe that the regulated community has certainty that they can receive due process to have their projects fairly considered?

2) Studies have clearly shown that even a slight increase in uncertainty causes exponential reduction in capital investments. Now that your Agency is expanding its authority over even more waters, how do you intend to instill certainty and reliability in the CWA permitting process?

3) Under current regulations and Corps practice "all water" in a flood plain is **not** jurisdictional. In fact, in a 2004 report, GAO identified only one Corps of Engineers district (Galveston) that used the floodplain alone to establish jurisdiction over a wetland and even in that district, if the wetland was separated by two or more berms, it was not considered a water of the United States.

According to the Rock Island District, the flood plain extends several miles inland from the Mississippi River and they felt that regulating all wetlands in the floodplain (much less all water) would be overreaching their authority.

The proposed rule leaves the scope of the flood plain to the "best professional judgment" of EPA or the Corps, only requiring the presence of land formed by "sediment deposition under present climactic conditions" and inundation when there is high water flow.

There are no limits on the period of time that a so-called flood plain could be free from water, allowing agency officials to use any historic flood to identify the extent of the flood plain. Attached is a picture of the land around Brunswick MO that was inundated during the 1993 Missouri River flood.

Also, below is a graphic that demonstrates the impacts of using the floodplain to identify waters of the U.S. As you can see, almost every facility manages water, if only stormwater, and if the facility is located in a floodplain then that water will be a water of the U.S under your proposed rule.

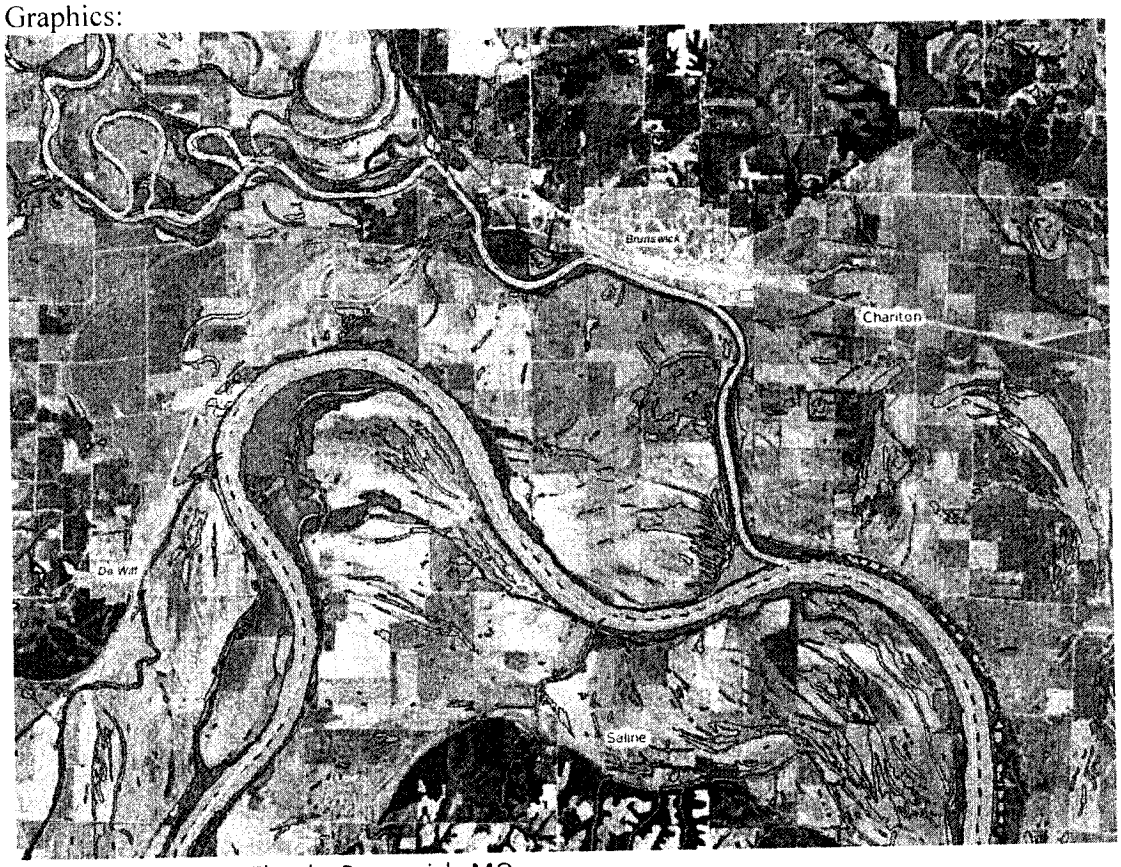
Last Friday, this situation got even worse. President Obama issued a new Executive Order that changes the definition of floodplain from the area inundated by a 100 year flood to one that is based on either the 500 year flood, 2 or 3 feet above the 100 year flood, or some other area based on climate modeling.

This new flood standard was issued without public participation. The order says you plan to get public input after the fact – but the new flood standard has been set.

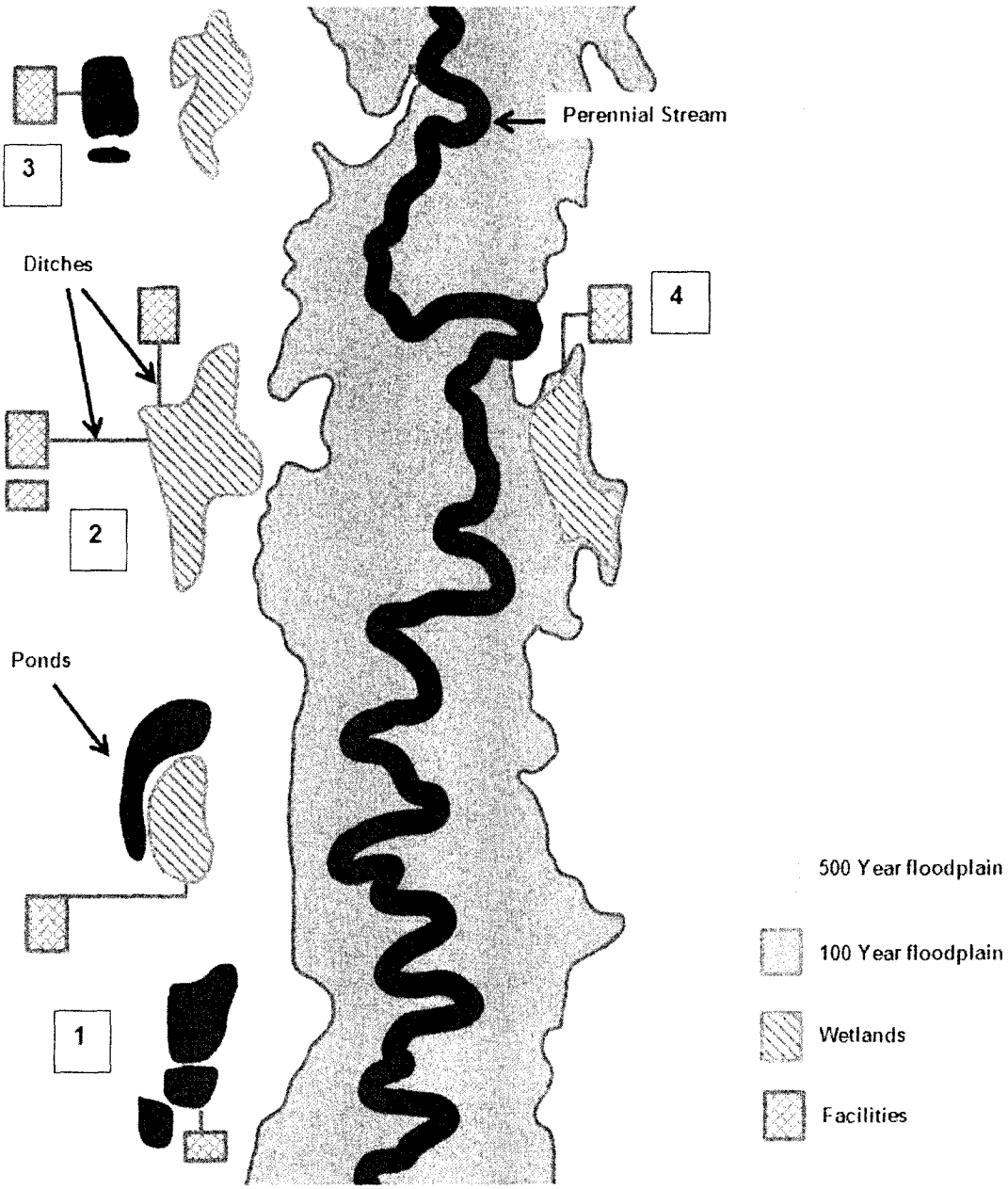
Will you commit to me that you will not try to turn water located at industrial facilities, farms, municipal water and wastewater facilities, and even homes into waters of the U.S. just because they are in a flood plain?

Will you also commit to me that the Executive Order will have no bearing on your waters of the U.S. rule?

Graphics:



1993 Missouri River Flood – Brunswick, MO


Perennial Stream
3
Ditches
4
2
Ponds
1
500 Year floodplain
100 Year floodplain
Wetlands
Facilities

QUESTIONS FOR THE RECORD
Senator James Inhofe (R-OK)
U.S. Senate Committee on Environment and Public Works

Impacts of the Proposed Waters of the United States Rule on State and Local Government
February 4, 2015

Questions for EPA Administrator McCarthy

Note: The responses reflect information based on the issuance of the final rule, published in the *Federal Register* on June 29, 2015, not the draft rule in-place at the time the questions were initially posed. This will help ensure that there is no confusion, given changes made in the final rule based on the extensive input received and the length of time that has passed since the rule was finalized.

1. **Please provide details on the resources, staffing, and procedures that will be utilized in reviewing the nearly 1 million comments received on the proposed waters of the United States rule. You promised to carefully consider these comments, yet also stated an intention to have the rule finalized in the spring of 2015. Taken with a 2-month interagency review period, this leaves 50-60 working days to review millions of pages of comments. How does EPA plan to complete such an expedited review?**

Response: All comments received were reviewed and a response to comments document was completed. The final rule was signed on May 27, 2015, and published in the Federal Register on June 29, 2015. The final response to comments document was posted on June 24, 2015.

2. **When does EPA anticipate having all of the comments posted for public review? Currently only a small percentage of the comments have been posted.**

Response: All public comments are available online at regulations.gov. All unique letters have been posted in the docket, which include both substantive and non-substantive comments. Multiple copies of mass mail-in campaigns are not posted to the docket, though the number of Americans providing the same comment are noted.

3. **You have stated that the rule narrows what is considered jurisdictional. What are you using as a baseline? Keep in mind that using previous rules rather than the 2008 Guidance would be misleading, because important elements of these have been struck down by subsequent court decisions.**

Response: As a result of the Supreme Court decisions in *SWANCC* and *Rapanos*, the scope of regulatory jurisdiction of the CWA in the rule is narrower than the EPA and the Department of the Army's (hereafter, "the agencies") existing regulations that have relied on the Commerce Clause of the Constitution since the 1970's. The most substantial change is the deletion of the existing regulatory provision that defines "waters of the United States" as all other waters "such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or

destruction of which could affect interstate or foreign commerce including any such waters: (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; (ii) from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (iii) which are used or could be used for industrial purposes by industries in interstate commerce." 33 CFR 328.3(a)(3); 40 CFR 122.2. Under the rule, these "other waters" (those which do not fit within the categories of waters jurisdictional by rule) would only be jurisdictional upon a case-specific determination that they have a significant nexus as defined by the rule. The final rule limits "other waters," as a general matter, to five specific subcategories: prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools and Texas coastal prairie wetlands, or those waters that meet specified distance limitations.

4. **You pledged to correct/tweak many parts of the rule during the recent Senate Committee on Environment and Public Works hearing on the proposed rule. However, as you stated, these issues are very complicated and difficult to address. Will you commit to subjecting the revised rule to a public notice and comment period?**

Response: The agencies received and processed over one million public comments submitted on the proposed rule. The agencies carefully considered comments submitted by stakeholders to develop the final rule, in a manner fully consistent with the Administrative Procedure Act. Additional notice and comment was determined not to be necessary.

5. **Municipal Separate Storm Sewer Systems ("MS4s") are permitted as "point sources" by EPA and states under the CWA Section 402 National Pollutant Discharge Elimination System ("NPDES") program. That is, MS4 owners and operators must obtain Section 402 permits for pollutant discharges from MS4s into WOTUS. Moreover, EPA regulations provide that the boundaries of MS4 systems – and all of the component ditches, drains, pipes, curbs, gutters, and outfall points that comprise these systems – should be delineated and mapped such as through the use of GIS technologies. Given that MS4 discharges are already subject to exhaustive NPDES permitting requirements shouldn't these mapped and identified storm sewer systems – and all of their component parts – be excluded from WOTUS coverage?**

Response: The Army and EPA did not change the jurisdictional status of various components of stormwater systems and drainage networks in the rule. During the public comment period, the agencies received many comments from representatives of cities, counties, and other entities concerned about how the proposed rule may affect stormwater systems. The agencies clarified their policy in the final rule by adding a new exclusion in paragraph (b)(6) for stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

The EPA considers MS4s to be systems and, in terms of jurisdiction, MS4s should be thought of as component parts and not a singular entity. As was true historically, MS4s can include jurisdictional and non-jurisdictional features. If needed, the jurisdictional status of such components could be evaluated. Implementation of the Clean Water Rule will not alter the manner in which MS4 systems currently operate or in which permits are issued under the CWA.

6. **EPA and the Army Corps regulations have long held that "waste treatment systems" are excluded from WOTUS coverage. See 40 C.F.R. § 122.2 (exclusions from WOTUS**

definition at subsection (b)(1)). MS4s treat, store, and recycle municipal and industrial pollutants that are present in stormwater flows, before such pollutants are discharged into WOTUS. In EPA's views, are MS4s considered "waste treatment systems"? If so, shouldn't MS4s thus be captured by the "waste treatment system" exemption to WOTUS? Do the agencies consider untreated stormwater that enters into and travels through an MS4 a "waste"?

Response: As a general matter, regulated MS4s are required to prohibit non-stormwater discharges into their systems, unless those discharges themselves have coverage under an NPDES permit. MS4s are designed to convey only stormwater. The agencies did not change the existing waste treatment exclusion. The final rule maintains this exclusion.

7. **When an industrial activity results in a discharge into an MS4, EPA has "always addressed such discharges as discharges through [MS4s] as opposed to 'discharges to waters of the United States' …." See Preamble to Phase 1 Rule, 55 Fed. Reg. 47,900, 47,997 (Nov. 16, 1990) (emphasis supplied). Therefore, shouldn't Section 402-permitted MS4s and their component parts be exempt from WOTUS coverage?**

Response: The agencies did not change the jurisdictional status of various components of municipal storm sewer systems. During the public comment period, the agencies received many comments from representatives of cities, counties, and other entities concerned about how the proposed rule may affect stormwater systems. The final rule expressly excludes stormwater control features created in dry land and certain wastewater recycling structures created in dry land.

8. **EPA's economic analysis of the proposed rule indicates that the rule will "not have an effect on annual expenditures" associated with development of state water quality standards, monitoring and assessment of water quality, and development of total maximum daily loads. Given that even by EPA's own estimate the rule will expand the current scope of federal jurisdiction, how do you assume that states will be able to expand such costly CWA programs at no expense?**

Response: EPA has carefully considered the potential impacts to all water programs in our economic analysis. In the case of water quality standards, states typically develop water quality standards for general categories of waters, which have been and are inclusive of the types of waters that have been jurisdictional. This rule will not change the requirements of state water quality standards to be consistent with the Clean Water Act (e.g., designated uses, criteria to protect those uses, antidegradation policies). If a state believes new or revised water quality standards need to be developed for specific types of waters, that need would exist with or without this rule.

States currently conduct assessments based on all existing and readily-available monitoring data. States are required to list waters that are impaired, but have discretion to prioritize this list for TMDL development, which may proceed over a period of several years under existing EPA policy. Monitoring, assessment, and TMDL development tend to occur in water segments where the agencies assert jurisdiction under current practices.

9. EPA's economic analysis of the proposed rule indicated that the rule would "be cost neutral or minimal" with respect to Section 402 discharge permits for industrial operations. Given that by EPA's own estimate the rule will expand the current scope of federal jurisdiction, as well as industry's clearly stated concerns that the rule will bring on-site waters under federal oversight, how will this rule be "cost neutral" for industrial operations?

Response: The economic analysis concluded that the proposed rule would not increase permitting for industrial related section 402 pollutant discharges, and therefore, would have only minimal effects on costs associated with these permits. States have been consistent in requiring section 402 permits for industries that discharge to waters like streams, lakes, and rivers. The agencies do not anticipate a significant change in the scope of waters currently covered by state 402 programs as a result of the final rule.

10. For the first time ever, your rule codifies CWA jurisdiction over on-site water management features such as ditches. The broad language in the rule could also easily be read to encompass other features on industrial sites that are not currently jurisdictional, such as settling ponds and basins. Why did your Agency fail to consider the additional costs added to the regulated public if on-site water management features – designed to ensure any discharges into downstream water meet environmental standards – are now themselves federally protected waterways under the CWA?

Response: The rule does not regulate any water type that was not historically considered jurisdictional. The final rule excludes ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary, and ditches with intermittent flow that are not a relocated tributary, or excavated in a tributary, or drain wetlands.

11. As you have heard from multiple entities, the broad overlapping definitions in the rule could bring a number of additional waters – including waters at industrial sites – under federal jurisdiction despite the intentions of the Agency. How do you intend to address these legitimate concerns in the final rule?

Response: The final rule describes how the agencies refined the rule to address circumstances where commenters had questions regarding the definitions.

12. EPA has stated that it does not intend to modify or in any way limit any of the current exclusions from CWA jurisdiction, including the waste treatment system exclusion. Is this true?

Response: The agencies' final rule retains all existing Clean Water Act exclusions, including the waste treatment system exclusion. The language of the existing waste treatment exclusion is not revised by the rule and the preamble emphasizes that implementation of this language does not change. The final rule maintains these exemptions.

13. If EPA – who is not the permitting authority in the case of Section 404 - can at any time retroactively veto the duly authorized specification of a disposal site, can it really be said that CWA Section 404 permits are *ever* final?

Response: The EPA's 42-year history of judicious use of its Section 404(c) authority has and continues to ensure predictability and certainty for the business community while at the same time providing a critical safeguard for the nation's most valuable and vulnerable water resources. The EPA has only exercised its 404(c) authority 13 times out of the millions of Corps authorizations for regulated activities in jurisdictional waters under Section 404 since the enactment of the CWA.

14. In 1972 during deliberations on the Clean Water Act in Congress, Senator Muskie noted that there are three essential elements to the Clean Water Act -- "uniformity, finality, and enforceability." Do you agree that finality is an important consideration for permits? How do the assertions made by EPA regarding the scope of its authority under Section 404 comport with the notion of permit finality?

Response: The question appears to reference EPA's use of the 404(c) authority in the case of a very large surface coal project in West Virginia. It is important to emphasize that the Spruce No. 1 Mine decision reflects a unique set of circumstances that we do not expect will be repeated. Throughout the history of review of the Spruce No. 1 Mine permit, EPA expressed its concerns about the environmental and water quality impacts associated with the project. After the Section 404 permit was issued in 2007, significant new scientific information emerged about the water quality impacts associated with surface coal mining projects like the Spruce mine. These additional data, presented in peer-reviewed scientific studies of the Appalachian ecoregion, reflect a growing consensus of the importance of headwater streams; a growing concern about the adverse ecological effects of mountaintop removal mining (specifically with regard to the effects of elevated levels of total dissolved solids discharged by mining operations on downstream aquatic ecosystems); and concerns that impacted streams cannot be easily recreated or replaced.

In addition, activities under the Section 404 permit for the Spruce No. 1 Mine were stopped by court action almost immediately after it was issued in 2007. Pursuant to an injunction agreement with the plaintiffs, Arch Coal had commenced limited operations at the Spruce No. 1 Mine. EPA's Section 404(c) decision is fully consistent with this earlier agreement, and does not affect mining that was already underway on the project site, outside the three tributaries identified in the final determination.

15. Without any discernible or objective criteria governing EPA's claimed authority under Section 404(c), EPA's retroactive revocation of a lawfully issued Section 404 permit has destroyed the essential element of permit uniformity. What impact do you think EPA's actions will have on investment in U.S. property and natural resource development?

Response: Passage of the Federal Water Pollution Control Act Amendments of 1972 (also known as the Clean Water Act) established a comprehensive program to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. The Clean Water Act provided overall responsibility to EPA, in partnership with the states, to reduce pollution entering waters of the United States in order to protect their uses as sources of drinking water; habitat for aquatic wildlife; places for swimming, fishing, and recreation; and for other purposes.

Under Section 404(c), the Act authorizes EPA to review activities in waters of the U.S. to determine whether such activities would result in significant and unacceptable adverse effects on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas, and to prohibit, restrict or deny, including withdrawal, of the use of any defined area as a disposal site. EPA does not view this authority as an opportunity to second guess the Corps' decision making, but rather as an important responsibility to conduct an independent review of projects that have the potential to significantly impact public health, water quality, or the environment, and which EPA has rarely used to prohibit or withdraw the use of an area. Specifically, the Act states:

> "The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to restrict or deny the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." 33 U.S.C. § 1344(c).

EPA works constructively with the Corps, the states, and other partners to assist applicants in developing environmentally sound projects in cases where a discharge of dredged or fill material into waters of the U.S. is proposed. EPA takes very seriously our responsibilities under the Clean Water Act, and believes that prudent and careful use of this authority is an effective provision for encouraging innovation to protect public health and preserving valuable environmental resources and our Nation's economic security. EPA has used its 404(c) authority sparingly, completing only 13 final decisions, known as Final Determinations, since 1972. To put this in perspective, over the past 43 years, the Corps is estimated to have authorized more than two million activities in waters of the U.S. under the Clean Water Act Section 404 regulatory program.

16. EPA's internal documents have stated that preemptive 404 actions, such as those taken with respect to the Pebble Mine in Alaska, could serve as a means of "watershed planning." If EPA is granted the authority to undertake such unilateral watershed planning, what would be the impacts on states?

Response: It appears that the internal document you are referring to was a draft document. Regardless, the statement does not reflect the position of the EPA. The EPA's authority under Section 404(c) of the CWA does not involve watershed planning.

The EPA takes very seriously the authority provided to the agency by Congress under Section 404(c) of the CWA. Indicative of the EPA's careful use of this authority is that since 1972 the agency has completed only 13 Final Determinations under Section 404(c) to restrict sites for disposal of dredged or fill material. Of the 13 Final Determinations completed by the EPA, two involved circumstances where permit applications had not yet been submitted to the U.S. Army

Corps of Engineers, both of which were completed during the Reagan Administration.[1] The EPA's 43-year history of judicious use of its Section 404(c) authority has and continues to ensure predictability and certainty for the business community while simultaneously providing a critical safeguard for the nation's most valuable and vulnerable water resources. We do not believe such rare and judicious use of this authority negatively impacts states in general, and we consult with individual states in the course of any specific 404(c) action.

17. Under the proposed rule, EPA and the Corps are suggesting that the movement of wildlife, including birds between one water and another, or the reliance by such species on a particular water within a watershed for any part of the species' life cycle, can be used to identify when waters are connected for purposes of asserting federal jurisdiction. Can you explain how this is different from the migratory bird rule struck down in SWANCC?

Response: The Supreme Court in *SWANCC* indicated that jurisdiction could not be based solely on the presence of migratory birds, and the rule reflects *SWANCC* by making clear that the presence of migratory birds alone is not a sufficient basis for Clean Water Act jurisdiction. This point is also emphasized in the preamble. Section 101(a) of the Clean Water Act identifies the objective of the Clean Water Act as "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." The biological connections among particular waters and traditional navigable waters, and their effects, can be relevant to establishing a "significant nexus" as articulated by Justice Kennedy in *Rapanos*. The biological integrity of water includes the functions those waters provide to maintain the integrity of the animal species that utilize the waters, both the tributaries and their downstream navigable waters. The rule took into account the available peer-reviewed scientific literature regarding the connectivity or isolation of streams and wetlands relative to large water bodies such as rivers, lakes, estuaries, and oceans. The agencies' decision-making in the rule regarding which waters are jurisdictional under the Clean Water Act is also necessarily grounded in the text of the Clean Water Act and applicable case law.

18. The proposed rule will make all perennial, intermittent, and ephemeral tributaries – including most streams and ditches and many dry washes – automatically jurisdictional. In connection with a hearing on the proposed rule by the House Science Committee, EPA released some USGS maps that show 8.1 million miles of intermittent, perennial and ephemeral tributaries, without even counting the ditches and dry washes. By contrast, EPA's latest National Water Quality Inventory Report to Congress says that State 305(b) reports identify only 3.5 million miles of federally jurisdictional "waters of the United States" nationwide under current regulations. Given that the preamble of the proposed rule indicates that USGS maps can be used to help identify jurisdictional waters, can you explain whether the additional 4.6 million stream miles reflected on the USGS maps released to the House Science Committee will not be treated as jurisdictional once the proposed rule is finalized? [Source: U.S.

[1] Bayou aux Carpes Site in Jefferson Parish, Louisiana (1985), and the Henry Rem, Marion Becker, et al., and Senior Corporation Sites in Dade County, Florida (1988). *See* http://water.epa.gov/lawsregs/guidance/wetlands/404c.cfm

Environmental Protection Agency, Office of Water, National Water Quality Inventory: Report to Congress (January 2009)].

Response: The rule provides for the first time a regulatory definition of "tributary" which requires certain physical characteristics which are indicative of sufficient volume and duration of flow to be a jurisdictional tributary. As a result, datasets such as USGS' National Hydrography Dataset that include streams and ditches, and maps developed from such datasets, include waters that may not meet the "tributary" definition.

The agencies' rule does not include a specific delineation and determination of waters across the country that would be jurisdictional. Consistent with the more than 40-year practice under the Clean Water Act, the agencies make determinations regarding the jurisdictional status of particular waters almost exclusively in response to a request from a potential permit applicant or landowner asking the agencies to make such a determination. This remains true under the final rule.

19. Today electric utilities, other energy facilities, and manufacturing facilities (often located in floodplains and riparian areas) design complex systems to manage and direct/divert water, stormwater, and waste on site so they can use the land and meet environmental requirements under federal and state law. These systems typically include ditches and canals that take water and waste to impoundments and treatment facilities and directly flow around and away from the facility. Only if the facilities end up discharging to a navigable water or adjacent wetland would they need to obtain Clean Water Act permits to meet water quality requirements at the point of discharge. The proposed rule would appear to make many of these ditches and impoundments themselves jurisdictional, requiring companies to meet water quality standards in the ditches and impoundments themselves rather than solely in downstream navigable waters and wetlands. EPA has long recognized that waste treatment systems are exempt from NPDES permit requirements and that water withdrawn for human use is not "waters of the United States." In keeping with these positions, does EPA agree that purpose-built water and waste management, collection, and diversion systems, including their ditches and impoundments, are not federally jurisdictional?

Response: The proposed rule made no changes to the existing exclusion for waste treatment systems. This remains true under the final rule. Whether or not a particular ditch is or would be jurisdictional under the Clean Water Act is a case-specific determination that depends upon the particular circumstances of each case. The agencies' rule actually reduces regulation of ditches compared to the 2008 Army/EPA Jurisdiction Guidance, which interprets and applies the *Rapanos* decision. The 2008 guidance states that the agencies generally will not assert jurisdiction over "ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water". In contrast, the final rule excludes ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary, and ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

In addition, for the first time, the agencies are excluding by rule ditches that are not tributaries to traditional navigable waters, interstate waters, or the territorial seas, regardless of their flow regime. These excluded ditches cannot be subject to regulation under any of the jurisdictional categories of "waters of the U.S." under the rule except for traditional navigable waters, interstate waters, and the territorial seas.

20. EPA, the Corps, and the regulated community rely on nationwide permits under Sections 402 and 404 to authorize discharges to jurisdictional waters without the need for individual permits, which take much longer and cost much more to obtain. This has been an especially important tool for energy infrastructure projects. Today, the use of a nationwide permit is subject to a small acreage limitation affected by "single and complete" projects, which are sections of projects that affect such waters. The proposed rule appears like it will make it more difficult to use nationwide permits by making it harder to qualify for them. How would EPA and the Army Corps ensure that most or all projects that now qualify for NWPs would continue to do so?

Response: The final rule does not alter the Clean Water Act Section 404 permitting process administered by the U.S. Army Corps of Engineers and two authorized states. The final rule does not alter the Corps' existing nationwide permits (NWPs) that currently streamline the permitting process for activities with minimal adverse effects on the aquatic environment. In general, the agencies believe the rule may expedite the permit review process in the long-term for certain waters by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community in light of the 2001 and 2006 Supreme Court cases.

The Corps' NWP program authorizes certain Clean Water Act Section 404 and Rivers and Harbors Act Section 10 regulated activities that would have no more than minimal adverse effects on the aquatic environment. For example, Nationwide Permit 3 ("Maintenance"), Nationwide Permit 12 ("Utility Line Activities"), and Nationwide Permit 14 ("Linear Transportation Projects") authorize, for example, energy infrastructure projects such as pipelines and are not affected by the new rule because the rule does not change the interpretation of a "single and complete project." Some of these activities may be non-reporting while others may require notification to the Corps. The Corps can provide a permit applicant with additional information regarding which Nationwide Permit might apply to a particular activity. In addition, some Corps districts also have State Programmatic General Permits and Regional General Permits allowing for efficient verifications of certain activities.

Authorization under the CWA is not needed for activities which occur in non-jurisdictional waters/features.

QUESTIONS FOR THE RECORD
Senator Barbara Boxer (D-CA)
U.S. Senate Committee on Environment and Public Works

Impacts of the Proposed Waters of the United States Rule on State and Local Government
February 4, 2015

Questions for EPA Administrator McCarthy

1. **Ms. McCarthy and Ms. Darcy, you have taken important steps to solicit public and stakeholder input as part of the rulemaking process. For example, I understand that the comment period was extended twice and lasted over 200 days, which seems like a long period of time compared to most rulemakings. Is this correct?**

Response: That is correct. In general, comment periods for EPA's proposed rules are 60-90 days.

   a. **I also understand EPA and the Corps have conducted significant outreach beyond the formal comment period. Can you also elaborate on the types of outreach conducted for this rule?**

Response: Early in the EPA and the Department of the Army's (hereafter, "the agencies") rulemaking process, the agencies consulted with tribes, state and local governments, and also reached out to small entities though a roundtable. This extensive outreach, as well as comments received on draft guidance that had been released earlier in 2011, shaped the agencies' internal work on the proposed rule over the next two years.

After releasing the proposal in March 2014, the EPA and the Corps conducted unprecedented outreach to a wide range of stakeholders, holding over 400 meetings all across the country to offer information, listen to concerns, and answer questions. We talked with a broad range of interested groups including farmers, businesses, states and local governments, water users, energy companies, coal and mineral mining groups, tribes, and conservation interests.

The agencies also worked closely with states and municipalities through a series of conference calls organized by both the Association of Clean Water Administrators and the Environmental Council of the States. In October 2014, the EPA conducted a second small business roundtable to facilitate input from the small business community, which featured more than 20 participants that included small government jurisdictions as well as construction and development, agricultural, and mining interests. The agencies prepared a report summarizing their small entity outreach, the results of this outreach, and how these results informed the development of the proposed rule.[1]

These actions represent the agencies' commitment to provide a transparent and effective opportunity for all interested Americans to participate in the rulemaking process.

[1] This report is available on the public docket at http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-1927.

b. How will EPA and the Corps incorporate the feedback you have received as you work to prepare a final rule?

Response: The agencies received more than a million comments on the rule. Most of these comments were identical or nearly identical letters received as part of multiple mass mailing campaigns. The agencies worked closely together to read, organize, and respond to these comments. All comments received were reviewed and a response to comments document was completed, which summarized the comments received and explained how they were considered and addressed in the final rule. The final rule was signed on May 27, 2015, and published in the Federal Register on June 29, 2015. The final response to comments document was posted on June 24, 2015.

2. The Clean Water Act broadly protected small streams and isolated wetlands for nearly 25 years until the *SWANCC* case in 2001. Can you tell the Committee whether the proposed Clean Water rule covers more waters than were protected prior to the SWANCC decision in 2001?

Response: As a result of the Supreme Court decisions in *SWANCC* and *Rapanos*, the scope of regulatory jurisdiction of the CWA in the rule is narrower than the EPA and the Department of the Army's (hereafter, "the agencies") existing regulations that have relied on the Commerce Clause of the Constitution since the 1970's. The most substantial change is the deletion of the existing regulatory provision that defines "waters of the United States" as all other waters "such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters: (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; (ii) from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (iii) which are used or could be used for industrial purposes by industries in interstate commerce." 33 CFR 328.3(a)(3); 40 CFR 122.2. Under the rule, these "other waters" (those which do not fit within the categories of waters jurisdictional by rule) would only be jurisdictional upon a case specific determination that they have a significant nexus as defined by the rule. The final rule limits "other waters," as a general matter, to five specific subcategories: prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools and Texas coastal prairie wetlands.

a. Were businesses in this country able to operate prior to 2001 when the Supreme Court narrowed the scope of the Act?

Response: Yes. Data from the Department of Commerce and other sources show that American businesses and the economy were very robust before the 2001 Supreme Court decision in *SWANCC*, when the scope of jurisdictional waters was broader than in the final rule.

3. Ms. McCarthy, many of my colleagues choose to focus on perceived overreach and exaggerated costs of the proposed rule without discussing the value of providing clean water for our families and businesses.

a. Can you elaborate on some of the benefits of the proposed rule?

Response: Smaller streams and waterbodies perform a host of essential and valuable functions for Americans. Fully one-third of all Americans—an estimated 117 million of us-- get some or all of our drinking water from public drinking water systems that rely in part on headwater, seasonal, or rain-dependent streams. Furthermore, inasmuch as upstream waters can transport pollutants to downstream waters, downstream waters cannot be protected without protecting those upstream waters. Science demonstrates that the upstream headwaters, wetlands, lakes, man-made channels, or other waters act together to significantly influence downstream waters by:

- Protecting downstream water quality,
- Reducing downstream flooding,
- Providing habitat for fish and other aquatic life that live in traditional navigable waters,
- Protecting property and infrastructure downstream,
- Contributing clean water for drinking, irrigation, recreation, commercial fishing, and industrial uses downstream, or
- Filtering pollution and reducing downstream treatment costs.

4. Ms. McCarthy, in administering landmark laws, like the Clean Water Act, it is important that Federal agencies follow the best available science. Can you expand on the science that was used to develop the rule and whether the protections included in the rule are supported by science?

Response: EPA's Office of Research and Development prepared the Science Report, a peer-reviewed synthesis of published peer-reviewed scientific literature summarizing the current scientific understanding of the connectivity of and mechanisms by which streams and wetlands, singly or in combination, affect the chemical, physical, and biological integrity of downstream waters.

The scientific literature summarized in the Science Report clearly demonstrates that all streams strongly influence how downstream waters function. Streams supply most of the water in rivers, transport sediment and organic matter, provide habitat for many species, and take up or change nutrients that could otherwise impair downstream waters. The literature also shows that wetlands and open-waters in floodplains of streams and rivers and in riparian areas (transition areas between terrestrial and aquatic ecosystems) have a strong influence on downstream waters since they act as the most effective buffer to protect downstream waters from nonpoint source pollution. Finally, the literature shows that wetlands and open-waters located outside of riparian areas and floodplains provide many benefits to rivers, lakes, and other downstream waters. The current science, however, does not provide enough information to generalize about their connectivity to downstream waters.

The process for developing the Science Report followed standard information quality guidelines for EPA. In September 2013, EPA released a draft of the Science Report for an independent Science Advisory Board (SAB) review and invited submissions of public comments for

consideration by the SAB panel. In October 2014, after several public meetings and hearings, the SAB completed its peer review of the draft Science Report. The SAB was highly supportive of the draft Science Report's conclusions. EPA revised the draft Science Report based on comments from the public and recommendations from the SAB panel.

QUESTIONS FOR THE RECORD

Senator Roger Wicker (R-MS)
U.S. Senate Committee on Environment and Public Works

Impacts of the Proposed Waters of the United States Rule on State and Local Government
February 4, 2015

Questions for EPA Administrator McCarthy

1. **Under your proposed rule; all waters in a flood plain are regulated, not just wetlands. So, under your rule you could be expanding jurisdiction to reach standing water in farmers' fields.**

Response: The rule does not say that all waters in a floodplain would be jurisdictional. The rule allows for waters in the floodplain to be considered adjacent waters under the proposed definition of "neighboring" or such waters may be subject to a case-specific significant nexus determination but the rule limited that definition to the types of water features that have historically been subject to CWA jurisdiction. The rule specifically exempts many water features from CWA jurisdiction. The EPA and the Department of the Army (hereafter, "the agencies") made clear in the preamble that the uplands located in "floodplains" would, under no circumstances, be subject to jurisdiction of the CWA. Further, the rule does not change any of the statutory permitting exemptions for farming, silviculture, ranching and other specified activities under Section 404 of the CWA.

2. **Will you commit to me that the final rule will not apply to "all water" in a flood plain or riparian area or "all water" that might flow over the land or that might move through the ground?**

Response: See previous response. Additionally, the final rule specifically excludes groundwater from regulation, as well as other listed exclusions. Those exclusions apply to waters regardless of their location in floodplains or riparian areas.

3. **Please respond to concerns expressed to me by members of the Council of International Shopping Centers in Mississippi that the proposed rule broadens the scope of the Clean Water Act beyond statutory and constitutional limits established by Congress and affirmed by the Supreme Court. Specifically, uncertainty is created by allowing certain features to be considered jurisdictional based on their relationship to "impoundments" while leaving "impoundment" undefined; and the reliance on the confusing concept of ordinary high water mark as the key identifier for tributaries.**

Response: The agencies did not propose substantive changes to the regulation of impoundments of waters of the United States. As a matter of law and policy, impoundments do not sever jurisdiction for upstream waters. The ordinary high water mark (OHWM) is used as the current practice for identifying tributaries and OHWM is defined in current Corps regulations. To provide additional clarity and for ease of use of the public, the agencies are including the Corps' existing definition of OHWM in EPA's regulations as well. Existing Corps regulations define

OHWM as the line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the banks, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas. 33 CFR 328.3(e). That definition is not changed by the rule.

4. Please provide definitions and respond to the concern by the International Council for Shopping Centers that the rule leaves many concepts vague and undefined such as "impoundment," "floodplain," "riparian area" and "shallow subsurface hydrologic connection."

Response: The agencies specifically requested comments on their proposed definitions and approaches. The final rule does not mention riparian areas, and instead uses clear distance-based bright lines to establish jurisdiction for determining adjacent waters and for determining whether a potential water may be subject to a case-specific significant nexus determinations. The final rule uses floodplain to mean a 100-year floodplain. The agencies intend to rely on FEMA flood zone maps wherever possible to identify the extent and location of the 100-year floodplain. The final rule also significantly revises and simplifies the definition of adjacent, in response to public comments.

The rule does not provide a definition for impoundments. However, the agencies' longstanding practice based on case law and current regulations does not change under the rule. The final rule does not include a provision defining neighboring based on shallow subsurface flow, though such flow may be an important factor in evaluating a water on a case-specific basis under paragraphs (a)(7) and (a)(8) to determine if the water has a significant nexus to a traditional navigable water (TNW), interstate water, or territorial sea. In the evaluation of whether a water individually or in combination with other similarly situated waters has a significant nexus to a TNW, interstate water, or the territorial seas, a variety of factors will influence the chemical, physical, or biological connections the water has with the downstream TNW, interstate water, or the territorial seas, including distance from a jurisdictional water, the presence of surface or shallow subsurface hydrologic connections, and density of waters of the same type).

QUESTIONS FOR THE RECORD
Senator Dan Sullivan (R-AK)
U.S. Senate Committee on Environment and Public Works

Impacts of the Proposed Waters of the United States Rule on State and Local Government
February 4, 2015

Questions for EPA Administrator McCarthy

1. **The EPA's economic analysis of the proposed rule says that it would result in a 3% increase in jurisdictional waters nationwide. Does the EPA have an idea of how much of that would be found in Alaska?**

Response: The 3% increase was an estimated increase in required permits for jurisdictional waters, informed by a review of jurisdictional determinations. This analysis was done on a national scale and we did not calculate the change by each state. The cited increase is a result of more clear determination criteria within the 'other waters' category.

2. **Will tundra with underlying permafrost be considered jurisdictional under the proposed rule?**

Response: As is currently the case, "tundra" is a term that does not distinguish between wetland and non-wetland landforms. Upland tundra is not, and never would be, "waters" and thus is not, and never would be, "waters of the U.S." Under the final rule, tundra could be jurisdictional if it meets the definition of waters of the U.S.

3. **Is permafrost itself jurisdictional under the proposed rule? If so, what is the significant nexus between permafrost and a navigable water, interstate water, or territorial sea?**

Response: The term "permafrost" specifically refers to permanently frozen soil. While permafrost may underlie wetlands or open waters, as well as non-wetlands, it is not, in and of itself, a water or a water of the U.S.

4. **Are mountaintops that are covered in snow pack, or glaciers jurisdictional under the proposed rule?**

5. Response: No, the upland areas located on mountaintops are not jurisdictional under the final rule simply because they are covered in snow pack or glaciers. **Are alpine muskeg peat bogs jurisdictional under the proposed rule?**

Response: The term "muskeg peat bog" typically refers to an area that would meet the regulations' unchanged definition of "wetland." Such areas are, and would remain, waters of the U.S. if they meet the definition of waters of the U.S.

6. Are forested wetlands on steep slopes that do not have a traditional hydrological connection (defined bed, bank or ordinary high water mark) jurisdictional?

Response: Such areas are, and would remain, waters of the U.S. if they meet the definition of waters of the U.S.

7. Businesses need fair and consistent permitting. However, clarity is not necessarily uniformity. Permafrost, tundra, muskegs, boreal forest spruce bogs, glaciers, and massive snowfields are features unique to Alaska and are absent in the vast majority, if not the entirety, of the rest of the U.S. Would you be willing to tailor the rule to take into account regionally specific characteristics?

Response: The EPA and the Department of the Army (hereafter, "the agencies") carefully considered input, including examples such as those in the question, from state and local governments, as well as the public comments, as we developed the final rule to provide additional clarity and definitions to inform jurisdictional determinations. The final rule reflects these considerations.

8. The EPA has stated a number of times, including at the hearing, that ditches are excluded from jurisdiction under the proposed rule. A closer read of the proposal lists a number of criteria a ditch must meet in order to be excluded from jurisdiction. Do you envision that some ditches located on residential and commercial properties will meet these criteria?

Response: Yes, we expect that many ditches located on residential and commercial properties will be excluded. For example, distributary ditches such as many irrigation ditches and water recycling/reuse canals move water from a tributary to its place of use, such as farm fields, but do not connect back to the tributary system. Because such ditches do not provide flow to a traditional navigable water, interstate water, or territorial sea, they are excluded under the rule when they are constructed in dry land. The final rule also excludes ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary, and ditches with intermittent flow that are not a relocated tributary, or excavated in a tributary, or drain wetlands.

9. Do you think that you have adequately complied with Executive Order 13132, which requires consultation with states for rulemakings that have "substantial direct effects on the states?"

Response: The scope of Clean Water Act jurisdiction is an issue of broad importance to states and many states have asked the EPA to respond to Supreme Court decisions in *SWANCC* and *Rapanos* through rulemaking. The EPA works closely with every state as a partner in the implementation of federal and state authorities and responsibilities. In this role, the EPA consulted early with states and state associations to develop the proposed rule.

As part of the agencies consultation process, the EPA held three in-person meetings and two phone calls in the fall and winter of 2011, to coordinate with state organization prior to

beginning formal rulemaking. EPA also worked closely with states and municipalities after the rule was proposed. Organizations involved include the National Governors Association, the National Conference of State Legislatures, the Council of State Governments, the National Association of Counties, the National League of Cities, the U.S. Conference of Mayors, the County Executives of America, the National Associations of Towns and Townships, the International City/County Management Association, and the Environmental Council of the States (ECOS). In addition, the National Association of Clean Water Agencies (NACWA) and the Association of Clean Water Administrators (ACWA) were invited to participate. As part of the consultation, 12 counties, eight associations and various state agencies and offices from five states (Alaska, Wyoming, Kansas, Tennessee, and Texas) submitted written comments. In addition, the EPA held numerous outreach calls with state and local government agencies seeking their technical input. More than 400 people from a variety of state and local agencies and associations, including the Western Governors' Association, the Western States Water Council and the Association of State Wetland Managers participated in various calls and meetings. The agencies' engagement with states continued through a series of conference calls organized by both the ACWA and the ECOS.

10. In your view, will this proposal result in fewer citizen lawsuits?

Response: Although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and Army provided greater clarity in the final rule to permit applicants, agencies, and the public. We believe that this will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders. Such clarity will also aid courts in responding consistently to citizen suits. We believe the final rule provides this clarity, consistency and predictability.

11. What assurances can you provide the public, state and local governments, tribes, and regulated industry, that this rule will not cause skyrocketing costs of compliance, including mitigation costs?

Response: This rule will clarify the scope of waters protected under the Clean Water Act, allowing entities to more easily understand where the Clean Water Act and all of its existing protections apply. By providing this clarity the agencies will first help entities control costs by minimizing the circumstances where a detailed jurisdictional analysis is necessary.

12. Even if EPA does not intend to regulate waters which may be interpreted as newly jurisdictional, how can small landowners avoid eventual litigation brought against them due to these wide interpretations?

Response: Landowners may request an approved jurisdictional determination (AJD) from the Corps. The agencies believe that the clarity provided by the rule will make conducting determinations easier. An AJD is an approved Corps' determination that jurisdictional waters are either present or absent at a site, and can be used by the landowner if a CWA citizen suit is brought against the owner. While the AJD would not be binding on the third party, we believe the Corps' expert opinion, and the landowner's reliance on the Corps' expert opinion, would be important factors to which any Court hearing such a suit would give substantial weight.

13. Section 101b of the Clean Water Act clearly states, "It is the policy of Congress to recognize, preserve, and protect the *primary* responsibilities and rights of the states to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." Why was the State of Alaska treated as nothing more than another contributor to the public comment period?

Response: The State of Alaska had the opportunity to participate in several of the agencies' outreach activities throughout the process, including those offered to states long before the rule was proposed. The State of Alaska, through their Attorney General's Office, provided 19 pages of comment on a waters of the US rulemaking to the agencies in December 2011 as part of the agencies' formal federalism process. These opportunities were not available to the general public, and were not part of the public comment period, which included additional state-focused engagement.

14. How do you think this proposed rule will impact the ability of state and local governments to exercise their authority with respect to land use management and planning?

Response: The Clean Water Act and the final rule do not regulate land use. The CWA only regulates the pollution and destruction of jurisdictional waters and the final rule clarifies the definition of "waters of the U.S." which has no direct impact on land use.

15. All activities that will potentially affect newly jurisdictional waters will need to be approved by the Corps, and will be subject to EPA veto. Do you think the rule confers upon the EPA expansive control over land use and economic development decisions traditionally reserved for state and local governments?

Response: No. The rule does not confer federal control over land use and economic development decisions being made by state and local governments. The Clean Water Act only regulates activities that discharge pollutants into jurisdictional waters. Activities that do not put pollutants into jurisdictional waters are not regulated and thus do not require permits from the Corps or EPA.

16. How will the proposed rule impact the ability to create critical infrastructure that requires 404 permits?

Response: The rule does not alter the Clean Water Act Section 404 permitting process administered by the U.S. Army Corps of Engineers and two authorized states. The rule does not alter the Corps' existing nationwide permits (NWPs) that currently streamline the permitting process for many energy infrastructure projects with minimal adverse effects to the aquatic environment, such as NWPs 8, 12, 17, 44, 51, and 52. In general, the agencies believe the final rule will expedite the jurisdictional determination process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the

regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. Thus, the final rule should help reduce the need for complex jurisdictional determinations.

17. The proposed rule is based on the Connectivity Study, which was itself developed without consultation with the states, local or tribal governments, or industry. The report lacks regional examples, including for Alaska. How can EPA rely on such generalized information?

Response: The agency's report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, was developed by the EPA's Office of Research and Development to inform the EPA's and Corps' proposed rulemaking. The final report synthesizes more than 1,300 peer-reviewed scientific publications, covers research from across the nation, and provides regional case studies in an appendix. Drafts of the report were subject to three separate rounds of peer review, which included a Science Advisory Board review and public comment period. Comments from the peer review panels, state and local governments, industry, other organizations, and individual citizens were used to develop the final report. In addition, the preamble to the proposed rule included an extensive discussion of the draft report and offered the public a second opportunity to provide comments on the scientific support for the proposed rule. The final rule retains this discussion of the science report, and relies on its conclusions.

18. By some estimates Alaska has 65% of the country's wetlands and the majority of these are dependent on continuous or discontinuous permafrost. Why didn't the Connectivity report include any maps or illustrations of Alaska?

Response: The agencies recognize the extent and value of wetland resources in Alaska, and the importance of permafrost in wetland formation in that state. Unfortunately, the national wetland maps available for this report (National Wetlands Inventory (NWI)) are incomplete in Alaska and cover a much smaller portion of the state than states elsewhere in the country. The report cites examples from research studies of streams and wetlands in Alaska.

19. Why did the EPA Science Advisory Board convened to look at the Connectivity Report only include academics and not a single regulatory expert or scientist from a state government?

Response: The SAB draws upon experts from many different research environments and frequently includes scientists from state governments on its review panels which are selected through a nomination process. The SAB Panel for the Review of the EPA Water Body Connectivity Report included the needed expertise to address the charge, which focused on the clarity, accuracy and completeness of the EPA literature summary rather than the regulatory implementation issues. As a result, panel expertise focused on the relevant scientific disciplines (e.g., stream and wetland ecology, fish and invertebrate biology, biogeochemistry and hydrology) and included members with considerable experience in wetland delineation and conducting field assessments to support permitting activities.

20. Writing such a broad rule that applies nationally is certainly a difficult task. Wouldn't the EPA have benefitted from additional assistance from state regulatory experts and those with intimate knowledge of specific watersheds and the unique hydrology and geographic features of the different regions of the country?

Response: As discussed in the response to Question #9, the agencies consulted robustly with state and local governments during the process of policy development for this rulemaking. In addition, the rulemaking has the benefit of over one million public comments that, among other things, discuss regional conditions and variability. The agencies carefully considered the input from state and local governments, as well as the public comments, as we developed the final rule. The final rule takes into account this important input.

21. Under the proposed rule, landowners with properties containing newly jurisdictional waters may experience a decrease in property value. Has EPA considered how the rule will affect property values?

Response: The agencies do not collect information on property values as a part of making jurisdictional determinations. These determinations are made consistent with science and the law.

22. Since the rulemaking was drafted before completion of the Connectivity Study, upon which it is based, how was there a meaningful opportunity to comment on the proposed rule provided?

Response: The agencies committed to a rulemaking built on the best-available, peer-reviewed science, and recognized the importance of ensuring that this supporting science was available to the public as they reviewed and commented on the proposed rule. In order to afford the public greater opportunity to benefit from the EPA Science Advisory Board's reports on the proposed jurisdictional rule and on the EPA's draft connectivity report, and to respond to requests from the public for additional time to provide comments on the proposed rule, the agencies extended the public comment period on the proposed rule to November 14, 2014. The SAB completed its review of the scientific basis of the proposed rule on September 30, and the SAB completed its review of the EPA's draft connectivity report on October 17.

QUESTIONS FOR THE RECORD

Senator David Vitter (R-LA)
U.S. Senate Committee on Environment and Public Works

Impacts of the Proposed Waters of the United States Rule on State and Local Government
February 4, 2015

Questions for EPA Administrator McCarthy

1. **In light of EPA's actions with respect to the Bristol Bay and Pebble mines incidents, do you believe that the regulated community has certainty that they can receive due process to have their projects fairly considered?**

Response: Alaskans have expressed concerns that the largest open pit mining project ever proposed in North America would impact one of the most sensitive environments remaining in the world today. The Bristol Bay Watershed is home to the world's largest remaining sockeye salmon fishery on which thousands of Alaskans depend for jobs and subsistence. Alaskans have certainty that their government is representing their interests to protect their health, their clean water, their jobs, and their economy. The EPA's decision will be made in an open and transparent process that ensures due process for all Alaskans and the regulated community.

2. **Studies have clearly shown that even a slight increase in uncertainty causes exponential reduction in capital investments. Now that your Agency is expanding its authority over even more waters, how do you intend to instill certainty and reliability in the CWA permitting process?**

Response: As a general matter, the EPA and the Department of the Army believe that the rule more clearly defines which waters are covered by the Clean Water Act, and which are not. In doing so, the agencies seek to reduce current uncertainty about whether or not particular waterbodies are, or are not, jurisdictional. We believe that predictability, certainty, and consistency will increase under the rule with associated benefits for jobs, the economy, and protection of the nation's clean water.

3. **Under current regulations and Corps practice "all water" in a flood plain is not jurisdictional. In fact, in a 2004 report, GAO identified only one Corps of Engineers district (Galveston) that used the floodplain alone to establish jurisdiction over a wetland and even in that district, if the wetland was separated by two or more berms, it was not considered a water of the United States.**

   According to the Rock Island District, the flood plain extends several miles inland from the Mississippi River and they felt that regulating all wetlands in the floodplain (much less all water) would be overreaching their authority.

   The proposed rule leaves the scope of the flood plain to the "best professional judgment" of EPA or the Corps, only requiring the presence of land formed by

"sediment deposition under present climactic conditions" and inundation when there is high water flow.

There are no limits on the period of time that a so-called flood plain could be free from water, allowing agency officials to use any historic flood to identify the extent of the flood plain. Attached is a picture of the land around Brunswick MO that was inundated during the 1993 Missouri River flood.

Also, below is a graphic that demonstrates the impacts of using the floodplain to identify waters of the U.S. As you can see, almost every facility manages water, if only stormwater, and if the facility is located in a floodplain then that water will be a water of the U.S under your proposed rule.

Last Friday, this situation got even worse. President Obama issued a new Executive Order that changes the definition of floodplain from the area inundated by a 100 year flood to one that is based on either the 500 year flood, 2 or 3 feet above the 100 year flood, or some other area based on climate modeling.

This new flood standard was issued without public participation. The order says you plan to get public input after the fact – but the new flood standard has been set.

Will you commit to me that you will not try to turn water located at industrial facilities, farms, municipal water and wastewater facilities, and even homes into waters of the U.S. just because they are in a flood plain?

Will you also commit to me that the Executive Order will have no bearing on your waters of the U.S. rule?

Response: Considerations regarding the presence of a floodplain are only relevant to a determination regarding "adjacent" waters and determining whether a water may be subject to a case-specific significant nexus determination.

In contrast, ponds located in floodplains may be jurisdictional, as well as wetlands that meet the regulatory definition of wetland and are not otherwise excluded from jurisdiction (e.g., prior converted cropland). The final rule uses floodplain to mean a 100-year floodplain. The agencies intend to rely on FEMA flood zone maps wherever possible to identify the extent and location of the 100-year floodplain.

United States Senate
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
WASHINGTON, DC 20510–6175

October 15, 2015

The Honorable Janet McCabe
Acting Assistant Administrator
Office of Air and Radiation
Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington, DC 20460

Dear Administrator McCabe:

On behalf of the Senate Committee on Environment and Public Works, we would like to thank you for testifying before the Committee on Tuesday, September 29, 2015. The committee greatly appreciates your attendance and participation in this hearing.

In order to maximize the opportunity for communication between you and the Committee, follow-up questions have been submitted by the members. We ask that you respond to each member's request in one typed document. To comply with Committee rules, please e-mail a copy of your responses to Elizabeth_Olsen@epw.senate.gov or deliver one hard copy by or before, Thursday, October 29, 2015. Responses should be delivered to the EPW Committee at 410 Dirksen Senate Office Building, Washington, DC 20510. Due to security restrictions, only couriers or employees with government identification will be permitted to bring packages into the building.

If you have any questions about the requests or the hearing, please feel free to contact Mandy Gunasekara, Counsel on the Committee's Majority staff at (202) 224-7841, or Ann Mesnikoff, Counsel, on the Minority staff at (202) 224-6948.

Sincerely,

Barbara Boxer
Ranking Member

James M. Inhofe
Chairman

Senate Committee on Environment and Public Works
Hearing entitled, "Economy-wide Implications of President's Obama's Air Agenda"
Questions for Administrator Janet McCabe
September 29, 2015

Chairman Inhofe:

1. While NAAQS SIPs and attainment can take years, a new NAAQS is effective immediately for new air permits. Any delay in EPA's implementation guidance and updating air quality models makes it more difficult for businesses to expand and create jobs. Will EPA issue clear guidance to regions and States encouraging the use of near-term alternatives in any situation where the issuance of new implementation updates is delayed?

2. What is EPA's plan to ensure that PSD permits are consistent with state and municipal compliance deadlines?

3. What is EPA doing to alleviate permitting challenges to industry for the immediate change in the ozone NAAQS?

4. Since the new NAAQS takes effect 60 days after publication in the Federal Register, and expanding facilities have to comply immediate at the effective date of the new NAAQS, has EPA prepared guidance for these facilities on how exactly to obtain a preconstruction permit?

5. Due to your Agency's premature reconsideration of the current 2008 ozone standard soon after President Obama took office, EPA did not submit final nonattainment designations to states until May of 2012. EPA did not even publish state implementation plan guidelines until earlier this year. Given these simple facts, do you believe that states have had sufficient time to comply with the current standard?

6. The President is reported in the press recently as saying that "some of the concerns" raised by municipalities over "legitimate economic issues have to be considered." I agree. Does the President support amending the Clean Air Act to allow at least some consideration of these legitimate economic issues?

7. The President is also reported as having said that the potential benefits of a new standard in the number of lives saved and asthma cases averted is substantially higher than the costs. Does the President, and by extension the EPA, understand that a large portion of those benefits in the new standard is unrelated to ozone? Do you further understand that if you remove those non-ozone related benefits, the costs of the rule will exceed the benefits?

8. EPA's own analysis indicates that the vast majority of benefits claimed under its stringent ozone proposal actually come from reducing $PM_{2.5}$. Why are you issuing an ozone rule to reduce $PM_{2.5}$? Didn't EPA just issue a new standard for $PM_{2.5}$?

9. With a lowered standard, EPA's own data suggests many additional areas will end up in nonattainment. An analysis of the three most recent years of ozone data show that 499 counties would be out of attainment or in metropolitan areas that are out of attainment with a 70 ppb standard. Won't the actual number be even greater given that EPA will make the nonattainment designations by 2017?

10. Earlier this year, EPA asked states to begin withdrawing outdated state plan revisions. As of this summer, there were over 650 outdated state plan revisions languishing at EPA.
    a. How will a new standard affect the backlog problem?
    b. Doesn't the backlog of state plan submissions at EPA suggest that EPA is overwhelmed with just trying to implement the current standards, much less the new ones?
    c. What will happen to this backlog when you start adding the SIP revisions needed to implement the Clean Power Plan?

11. Isn't it true that EPA has finalized decisions in the past with regard to ambient air quality standards that have differed from CASAC's recommendation?

12.

13. EPA's modeling indicates that its ozone standard may actually increase mortality in cities like Houston. Can you please explain how this rule could end up increasing deaths in some areas?

14.

15. While CASAC said it made a "scientific" judgment in recommending a 70 ppb ozone standard, it called its recommendations for standards lower than 70 ppb "policy advice." Can you explain the difference?

16. EPA chose to project the costs of its proposed ozone standard in one year, 2025, eight years after counties will be designated as nonattainment under the proposal.
    a. Does EPA's modeling capture the full cost of lost economic activity that counties in nonattainment areas will experience during those eight years?
    b. EPA chose to project the costs of its proposed ozone standard in 2025 since that would be the year in which most counties would have already attained the standards based on federal controls. Did EPA include in its cost, the many local controls that will be unnecessarily imposed? If EPA assumed longer compliance deadlines, shouldn't it write those compliance extensions into the final rule?

17. EPA's own data shows that many national wilderness areas and national parks would fail EPA's stringent proposed ozone standards. Given those readings, should we not expect that such standards could have serious consequences on even marginally-economically developed areas?

18. EPA's proposed ozone air standards will substantially increase nonattainment areas across the country. In fact, many of America's most pristine national parks would have failed those

standards. Does a policy that pushes the Grand Canyon and Yellowstone National Parks into nonattainment make sense? If pristine wilderness areas flunk the standard, how would developed areas ever find a way to comply with the standard?

19. High levels of natural background ozone may cause many otherwise clean states, especially in the West, to be unable to meet EPA's stringent ozone proposal even with costly emission controls. EPA says it can deal with these concerns through its "exceptional events" program. Yet, since 2008, Utah has submitted 12 exception event demonstrations, and EPA has yet to approve one. EPA's track record on exceptional events has been terrible – why should we think the exceptional events program can provide ozone regulatory relief to states with high background ozone?

20. How many Exceptional Events, Rural Transport, and International Transport submissions has EPA received since the 1997 standard was finalized? How many exceptions did EPA grant?

21. What is the exact timeline for issuance of the Exceptional Events guidance?

22. EPA claims ozone health benefits at levels below background. How can EPA claim health benefits at ozone levels that are impossible to achieve?

23. I understand that EPA does not exclude Mexican and Canadian ozone emissions when it determines background levels of ozone. What could a county in my district due to control emissions in a foreign country?

24. If EPA sets ozone standards at or below background concentrations, states will be left "controlling" natural or transcontinental emissions. What can a state do to control naturally occurring or transcontinental ozone?

25. In 1997, the Clinton EPA declined to set ozone standards at the level EPA is now considering in part because such standards would be so close to background levels that they would be "inappropriately targeted" in some areas. Have background levels changed since 1997?

26. The Clean Air Act's legislative history call's near-background air standards a "no-risk philosophy [that] ignores all economic and social consequences and is impractical." Do you agree with that statement?

27. EPA chose to project the costs of its proposed ozone standard to 2025, eight years after counties will be designated as nonattainment areas under the proposal. What consequences will those counties face from being designated nonattainment?

28. According to EPA, many of the emissions reduction controls needed to meet the stringent proposed ozone standard in the east and all of the reductions required in California have not even been invented yet. How does EPA explain the rationale of imposing this much burden on the American people when EPA itself doesn't even know how this rule can be accomplished?

29. The ozone proposal relies heavily on two exposure studies in which the overall results – by EPA's own benchmark – did not indicate a clinically-significant link between ozone concentrations below the current standard and health effects. EPA ignores these overall results and instead relies on data from just 9 study participants to claim there are health effects below the current standard. Yet at least 5 other study participants showed health *improvements* from being exposed to ozone. Shouldn't this caution EPA against over-interpreting outlier results from these studies?

30. Your Agency consistently touts the new body of scientific studies developed since the finalization of the 2008 standard. What studies were not included in the 2010-2011 reconsideration by the Obama Administration that are included in the development of this final rule?

31. How many counties in the U.S. currently contain EPA-designated ozone monitors?
    a. How many ozone monitors does the EPA maintain across the U.S.?
    b. When – if ever – will additional monitors be required?
    c. Please detail the changes being made to the ozone monitoring networks, including any changes in monitor location, redistribution, density, location requirements, etc.

32. When will EPA issues implementation guidance for the new standard?

33. When did EPA send the ozone rule to the Federal Register? Did EPA request a publication date? When does EPA expect the rule to be published in the Federal Register?

Clean Power Plan

1. Congressional intent alongside agency practice has typically resulted in less stringent emission standards for existing sources than for new sources. Why, under the final rule , is the standard for existing power plants more stringent than the standard for new power plants?

2. Recently, EPA Administrator McCarthy stated that you expect "the majority" of states to submit a State Implementation Plan. How many states have currently committed to submit a final SIP in 2016 and how many do you currently expect to request an extension?

3. In order to get a two-year extension to 2018, states must provide "a demonstration of how they have been engaging with the public, including vulnerable communities, and a description of how they intend to meaningfully engage with community stakeholders during the additional time (if an extension is granted) for development of the final plan."

a. How does the agency define "vulnerable communities"?
b. How does the agency define "meaningful" engagement?

4. Some Clean Power Plan supporters have suggested EPA can impose federal implementation plans before states have the opportunity to submit a state plan.
   a. What is the earliest date that EPA will consider imposing a federal plan?

5. EPA has repeatedly stated it will not take punitive actions, including restricting highway funds, for states that do not submit satisfactory state plans under the Clean Power Plan.
   a. Is it true that even if a federal plan is imposed on a state, EPA can and will still delegate key aspects of implementation to the state? Please explain.
   b. If a Federal Implementation Plan (FIP) is imposed, will states be able to subsequently submit complete or partial state plans that would replace the federal plan? Are there any limits to those options?

6. A recent U.S. Chamber white paper suggested: "An approved [state plan] under the pending [Clean Power Plan] could effectively give NGOs a seat at the table for decisions now made by the State alone. For instance, an NGO might sue an electric utility that it believed was failing to dispatch electricity or generate renewable energy in compliance with a [state plan] — even if the State did not share that belief.... An NGO could potentially sue local construction companies or building owners who fail to achieve a [state plan's] energy-efficiency requirements."[1]
   a. Is there any way that state plans would not be subject to enforcement actions by environmental litigants like the Sierra Club?

7. The New York Times quoted EPA officials who were then crafting the Clean Power Plan as saying its legal interpretation is "challenging" and that "this effectively hasn't been done." Given the novelty, shouldn't we wait to see how the courts rule on this "challenging interpretation" that "hasn't been done"?

8. The Supreme Court's *UARG v. EPA* decision sends a clear warning to EPA that expansive use of authority faces substantial legal hurdles, "When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" EPA is seeking to overhaul the country's entire electric grid by reinterpreting a law that has been on the books for over 40 years. Where did Congress speak clearly to give the Agency such powers?

9. The Supreme Court's *UARG v. EPA* decision is clear that control technology "cannot be used to order a fundamental redesign of the facility," is "required only for pollutants that the source itself emits," and "may not be used to require reductions in a facility's demand for energy from the electric grid." Yet, the Clean Power Plan uses control technologies to redesign the entire electric grid, requiring controls well "outside the fence-line" of a power plant and often where no greenhouse gases are actually emitted. Is EPA concerned that the Clean Power Plan seems to be at odds with recent Supreme Court rulings?

---

[1] Sidley Austin, LLP, *Potential Enforcement Implications and Liabilities Associated with EPA's Proposed Greenhouse Gas ESPS Rule*, available at http://www.energyxxi.org/sites/default/files/ESPS%20white%20paper%206.17.15.pdf

10. Environmental groups have argued that section 111(d) does not allow emissions trading because sources must continuously demonstrate compliance with performance standards. Does EPA agree or disagree with these environmental groups – can EPA set up an emissions trading program under 111(d)?

11. In 2010, EPA concluded that CO_2 emissions substantially larger than those from the Clean Power Plan had so little impact on global climate that "extrapolating from global metric to local effect with such small numbers . . . remain beyond current modeling capabilities." How, then, does EPA claim $20 billion in climate benefits from modeling that attempts to tie changes in global carbon metrics to local effects?

Ranking Member Boxer:

1. EPA has undertaken significant outreach to stakeholders on the Final Clean Power Plan. Can you describe in more detail the engagement EPA has had with states and other stakeholders since the final Clean Power Plan was signed? Can you also provide information on EPA's plans for outreach going forward?

2. I recently joined with colleagues on a letter to EPA regarding the Clean Energy Incentive Program. The program encourages renewable energy development but is focused on wind and solar power. There are many other renewable sources that could also help to reduce carbon pollution. Will EPA look at how this program can account for geothermal energy and other proven renewable power sources?

3. EPA's Clean Power Plan gives significant flexibility to states in achieving the emissions reductions in the final rule. What steps did EPA take to give states flexibility in how they plan for and achieve the reductions needed by 2030?

Senator Wicker:

1. EPA Regional staff referenced state-specific spreadsheets and calculations to state DEQs during calls and e-mails. MS along with other states requested copies of these documents, but they were never provided. Why did EPA not provide the states with information they requested and needed to adequately review and comment on the proposed rule?

2. After states commented on the Clean Power Plan that the renewable energy targets were unachievable when set using regional data rather than state-specific data, why did EPA continue to include and substantially increase the amount of proposed renewable energy?

3. South Mississippi Electric (SME) is a Generation & Transmission Cooperative serving over 419,000 homes and businesses throughout 55 counties in the State of Mississippi. One of SME's biggest concerns is the drastic and unproven shift to renewables in the final version of the Clean Power Plan that could require 21 percent of SME's generation to come from

renewables by 2030. To meet the 2030 emissions rate, over 21 of these facilities would be required at a cost in excess of $2 billion. SME currently has just over $2 billion in assets that have been accumulated over about a 50 year time frame. How will people in my state be able to afford costs associated with the dramatic shift from fossil generation to renewable energy generation set forth in the Clean Power Plan?

4. Has EPA ever based performance standards on measures beyond the fence line of a source, as it does in the Clean Power Plan?

5. Has EPA ever claimed authority section 111(d) of the Clean Air Act to order a facility to stop operating, as it does in the Clean Power Plan?

6. If EPA implements a lower ozone standard, many areas that are currently in attainment will not be. How will you help these jurisdictions navigate the complex and burdensome federal ozone standard bureaucracy and work to bring them back into attainment?

7. Did EPA use a fixed cap on costs for unknown controls in its latest cost projections of lowering the ozone standard, unlike in 2010 when EPA assumed that costs for "unknown controls" increased as more pollution was removed?

Senator Fischer:

1) When considering the appropriate level to set the ozone standard you agency "placed the most weight on human exposure studies" – at least according to the proposed rule. Isn't it true that only ONE of these studies – the Schelegle study – shows effects that may be considered adverse at levels below the current standard – which appears to show impact at 72 ppb. Aren't you concerned that other peer reviewed studies have called your strongest evidence into question?

2) Are you familiar with the recent study coming out of NASA[2], which reports that the United States is importing ozone from China? Does the EPA – or anyone in the government - have a way to measure the amount of ozone we are importing from our competitors overseas? If we cannot measure the ozone we are importing from China – how can the EPA's so-called exceptional events exclusion work to hold states harmless for this pollution originating from China?

3) Does the EPA have the discretion under the Clean Air Act to take into account the issue of background ozone when setting the standard? Since the EPA has the discretion to consider the dilemma posed by background ozone – did the agency take background ozone issues into account when setting the ozone standard?

[2] http://www.jpl.nasa.gov/news/news.php?feature=4685

Clean Power Plan

4) Nebraska operates under a statutory mandate to provide low-cost and reliable public power. A recent study conducted by the Platte Institute, a nonpartisan "think tank" in Nebraska, found that the Clean Power Plan would cost Nebraskans an additional $3.5 billion for natural gas and renewable infrastructure, and raise residential electricity prices by 24 percent by 2020. Additionally, the Nebraska Department of Environmental Quality[3] stated that the Agency has not accounted for the state's significant investment in its existing electric generating units to comply with federal air quality regulations, a cost also borne by ratepayers.

   How can Nebraska continue meeting its statutory public power obligations while also complying with the rule?

5) According to the Nebraska Public Power District, which services 86 of Nebraska's 93 counties, the EPA failed to show an emission limitation which is achievable or adequately demonstrated in the state of Nebraska. NPPD also stated that achieving a 6 percent efficiency rate for existing coal plans is "virtually impossible," and that it lacks the transportation capacity to run its gas-fired generators at 70 percent statewide as mandated by the rule[4].

   Can you describe the calculations used when setting Nebraska's target reduction, particularly in relation to efficiency and utilization?

[3] Comments of the Nebraska Department of Environmental Quality on *Proposed Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34830 (June 18, 2014).

[4] Comments of the Nebraska Public Power District on *Proposed Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34830 (June 18, 2014).

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR 18 2016

OFFICE OF CONGRESSIONAL
AND INTERGOVERNMENTAL RELATIONS

The Honorable James M. Inhofe
Chairman
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed please find the U.S. Environmental Protection Agency's responses to the Committee's questions for the record following the September 29, 2015, hearing titled "Economy-wide Implications of President Obama's Air Agenda."

I hope this information is helpful to you and the members of the Committee. If you have further questions, please contact me or your staff may contact Kevin Bailey in the EPA's Office of Congressional and Intergovernmental Relations at bailey.kevinj@epa.gov or at (202) 564-2998.

Sincerely,

Nichole Distefano
Associate Administrator

Enclosure

United States Senate
WASHINGTON, DC 20510

April 1, 2015

The Honorable Gina McCarthy
Administrator
Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

Dear Madam Administrator:

During the March 4, 2015, Committee on Environment and Public Works hearing on the Environmental Protection Agency's (EPA) Fiscal Year 2016 budget, several important questions regarding current climate science and data were raised. Although questions regarding the impacts of climate change were clear and straightforward, none of the questions received direct answers, and many responses contained caveats and conditions.

We write today to emphasize that these questions were not posed lightly or in passing. In fact, questions related to whether projected climate impacts are actually occurring are critical to verifying EPA's commitment to the best science and data, especially as the agency proposes costly carbon dioxide emissions reductions throughout the United States. Stated differently, given that the Administration's proposal to fundamentally change the nature of domestic electricity generation is based on the apparent need to avoid "devastating" climate impacts to the United States and the planet, it is imperative that the agency be candid and forthright in assessing the reality of this projection.

EPA must demonstrate its commitment to sound science and data by providing prompt and thorough responses to questions from Congress. Accordingly, we request and look forward to detailed answers to the following questions:

Drought

1) In its 2013 Fifth Assessment Report, the Intergovernmental Panel on Climate Change (IPCC) concluded the following:

> [T]here is not enough evidence at present to suggest more than low confidence in a global-scale observed trend in drought or dryness (lack of rainfall) since the middle of the 20th century, owing to lack of direct observations, geographical inconsistencies in the trends, and dependencies of inferred trends on the index choice. Based on updated studies, AR4 conclusions regarding global increasing trends in drought since the 1970s were probably overstated. However, it is likely that the frequency and intensity of drought has increased in the Mediterranean and West Africa and decreased in central North America and north-west Australia since 1950.

Do you agree or disagree with the IPCC's conclusion? Please provide all data, analyses, and other evidence that you reviewed and relied on to reach your conclusion.

2) In its Special Report on Extreme Events (*Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation*), the IPCC concluded the following:

> There is medium confidence that since the 1950s some regions of the world have experienced a trend to more intense and longer droughts, in particular in southern Europe and West Africa, but in some regions droughts have become less frequent, less intense, or shorter, for example, in central North America and northwestern Australia.

Similarly, the U.S. Climate Change Science Program's 2008 report (*Weather and Climate Extremes in a Changing Climate*) concluded:

> [D]roughts have, for the most part, become shorter, less frequent, and cover a smaller portion of the U. S. over the last century.

Do you agree or disagree with these two conclusions? Please provide all data, analyses, and other evidence that you reviewed and relied on to reach your conclusion.

3) At the March 2015 budget hearing, Senator Sessions asked for "the worldwide data about whether or not we are having fewer or less droughts." You responded, "I am happy to provide it but I certainly am aware that droughts are becoming more extreme and frequent."

a. Please provide all data, analyses, and other evidence held or used by EPA regarding worldwide drought frequency.

b. Please provide all data, analyses, and other evidence which warranted your conclusion that "droughts are becoming more extreme and frequent."

Hurricanes/cyclones

1) The IPCC Fifth Assessment Report concluded the following:

> Current data sets indicate no significant observed trends in global tropical cyclone frequency over the past century. . . . No robust trends in annual numbers of tropical storms, hurricanes and major hurricanes counts have been identified over the past 100 years in the North Atlantic basin.

Do you agree or disagree with the IPCC assessments regarding data sets on global tropical cyclone frequency and trends in annual tropical storms, hurricanes, and major hurricanes in the North Atlantic basin?

2) Does EPA have any data, analyses, or other evidence demonstrating an increase in global tropical cyclone (hurricane) frequency over the past century? If so, please provide such data, analyses, or evidence.

3) Does EPA have any data, analyses, or other evidence demonstrating an increase in the annual number of tropical storms, hurricanes and major hurricanes over the past 100 years in the North Atlantic basin? If so, please provide such data, analyses, or evidence.

4) At the March 2015 budget hearing, Senator Sessions asked whether there have been more or less hurricanes in the last decade. You responded that "[t]here have been more frequent hurricanes and more intense." Please provide all data, analyses, and other evidence which warranted your response.

5) Do you agree or disagree that is has been nearly ten years since the last major hurricane struck the United States?

Temperature data

1) Dating back to the 1970's, IPCC climate models have historically predicted a significant increase in global temperatures. At the March 2015 budget hearing, Senator Sessions asked "[i]f you take the average of the models predicting how fast the temperature would increase, is the temperature in fact increasing less than that or more than that?"

   You replied that you could not "answer that question specifically," but later committed to submitting written information explaining whether you believe the models have been proven correct and whether temperatures have increased less than projected or more than projected.

   Please provide data and analyses showing actual global average temperatures since 1979 versus IPCC predictions, including an EPA-produced chart comparing actual global average temperature increases since 1979 (when satellite temperature data became available) versus the latest IPCC predictions. Please also provide your conclusion on whether IPCC climate models have proven correct.

2) At the March 2015 budget hearing, you stated "[t]here are many models and sometimes it is actually going faster and sometimes slightly slower than the model predicts, but on the whole, *it makes no difference* to the validity and the robustness of climate science that is telling us that we are facing an absolute challenge that we must address both environmentally and economically from a national security perspective, and for EPA, from a public health perspective."

   Do you agree that EPA has a duty to review and verify the accuracy of climate projections which have served as the basis for the agency's regulatory policy and agenda?

Climate impact monitoring

1) According to EPA's website, the agency's Office of Environmental Information "manages the life cycle of information to support EPA's mission of protecting human health and the environment" and "ensure[s] the quality of EPA's information."

   The Office's Quality Management Program develops "Agency-wide policies, procedures and tools for quality-related activities relating to the collection and use of environmental information."

In addition, EPA's Office of Information Collection "works in collaboration with EPA partners and customers to develop and implement innovative policies, standards and services that ensure that environmental information is efficiently and accurately collected and managed."

What policies do these and other offices at EPA have in place to monitor and verify the accuracy of agency climate projections? Please provide all reports, analyses, memoranda, and other information from the past ten years in which EPA has reviewed the accuracy of its climate projections.

2) What portion of EPA's budget request for FY 2016 is dedicated to monitoring and verifying the accuracy of the agency's climate projections?

Please provide your responses no later than April 21, 2015.

Very truly yours,

Senator Jeff Sessions

Senator James M. Inhofe

Senator Roger Wicker

Senator John Barrasso

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 22 2015

OFFICE OF
AIR AND RADIATION

The Honorable James M. Inhofe
United States Senate
Washington, DC 20510

Dear Senator Inhofe:

Thank you for your April 1, 2015, letter to U.S. Environmental Protection Agency Administrator Gina McCarthy regarding climate science and data. The Administrator asked that I respond on her behalf.

The EPA is committed to using sound science and data as the foundation for protecting human health and the environment. For climate change, we rely primarily on the scientific assessments of the U.S. Global Change Research Program (USGCRP), the United Nations Intergovernmental Panel on Climate Change (IPCC), and the National Research Council (NRC) of the National Academies. These assessments synthesize and assess research across the entire body of scientific literature, including consideration of uncertainty, in their development of key scientific findings. Enclosed are more specific responses to the issues raised in your letter.

Thank you again for your letter. If you have questions or concerns, please contact me or have your staff contact Patricia Haman in the EPA's Office of Congressional and Intergovernmental Relations at haman.patricia@epa.gov or (202) 564-2806.

Sincerely,

Janet G. McCabe
Acting Assistant Administrator

Enclosure

Enclosure: Response to April 1, 2015, letter from Senators Sessions, Inhofe, Wicker, and Barrasso

Below we present some scientific findings from the assessment literature addressing the four topics raised in the incoming letter, namely drought, hurricanes/cyclones, temperature data, and climate impact monitoring.

Drought

With regard to climate change and drought, the assessment literature is clear that drought is a regional phenomenon and influenced by climate change. While changing patterns of precipitation (both spatial and temporal) are an expected consequence of anthropogenic global climate change, considering only global or even national metrics obscures important local trends. According to the 2014 National Climate Assessment (NCA)[1], regions closer to the poles will see more precipitation, while the dry subtropics are expected to expand. This has been summarized as wet areas are getting wetter and dry areas are getting drier. In particular, the NCA notes that the western United States, and especially the Southwest, is expected to become drier. The 2013 Intergovernmental Panel on Climate Change Fifth Assessment Report (IPCC AR5)[2] similarly determined that future decreases in soil moisture and increases in the risk of drought are likely in presently dry regions, highlighting the Southwest USA as one of the regions with the most prominent likely soil drying. These projections are consistent with the recent observed drought trend in the West. At the time of publication, even before the last two years of extreme drought in California, the NCA stated that tree ring data were already indicating that the region might be experiencing its driest period in 800 years. The U.S. Climate Change Science Program's 2008 report (*Weather and Climate Extremes in a Changing Climate*)[3] referenced in the letter also highlighted the link between rising temperatures and increasing drought trends in the Southwest and parts of the interior West. Another assessment referenced in the letter, the 2011 IPCC Special Report on *Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation* (SREX)[4], concludes that there is "medium confidence that droughts will intensify in the 21st century in some seasons and areas, due to reduced precipitation and/or increased evapotranspiration. This applies to regions including southern Europe and the Mediterranean region, central Europe, central North America, Central America and Mexico, northeast Brazil, and southern Africa."

---

[1] Melillo, Jerry M., Terese (T.C.) Richmond, and Gary W. Yohe, Eds., 2014: *Climate Change Impacts in the United States: The Third National Climate Assessment*. U.S. Global Change Research Program, 841 pp. doi:10.7930/J0Z31WJ2.

[2] IPCC, 2013: *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* [Stocker, T.F., D. Qin, G.-K. Plattner, M. Tignor, S.K. Allen, J. Boschung, A. Nauels, Y. Xia, V. Bex and P.M. Midgley (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, 1535 pp.

[3] CCSP, 2008: *Weather and Climate Extremes in a Changing Climate. Regions of Focus: North America, Hawaii, Caribbean, and U.S. Pacific Islands*. A Report by the U.S. Climate Change Science Program and the Subcommittee on Global Change Research. [Thomas R. Karl, Gerald A. Meehl, Christopher D. Miller, Susan J. Hassol, Anne M. Waple, and William L. Murray (eds.)]. Department of Commerce, NOAA's National Climatic Data Center, Washington, D.C., USA, 164 pp.

[4] IPCC, 2012: *Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation*. A Special Report of Working Groups I and II of the Intergovernmental Panel on Climate Change [Field, C.B., V. Barros, T.F. Stocker, D. Qin, D.J. Dokken, K.L. Ebi, M.D. Mastrandrea, K.J. Mach, G.-K. Plattner, S.K. Allen, M. Tignor, and P.M. Midgley (eds.)]. Cambridge University Press, Cambridge, UK, and New York, NY, USA, 582 pp.

Hurricanes/Cyclones

Anthropogenic climate change is also expected to contribute to a number of changes in extreme weather events. For example, there is an increasing trend for heavy downpours in many parts of the United States. According to the SREX assessment, tropical cyclone *intensity* is also expected to increase in the future, but the *frequency* of cyclones is likely to either decrease or remain unchanged. In addition to an increase in the intensity of the biggest storms, the SREX assessment found that heavy rainfall associated with tropical cyclones is likely to increase with warming. Sea level rise also will magnify the damages from storm surge. The number of landfalling major hurricanes is generally small and it is difficult to draw conclusions from the number of landfalls in a short period of recent years. Hurricane landfall is difficult to predict, but, when they do hit, the climate-change related impacts resulting from heavier precipitation and increased storm surge magnified by sea level rise are expected to increase the severity of damages. Additionally, a storm's status at landfall may not necessarily equate to the scope of the damage: while Sandy did not make landfall as a hurricane in 2012, it was one of the most damaging storms in U.S. history. Finally, the IPCC AR5 also stated that "it is virtually certain that the frequency and intensity of the strongest tropical cyclones in the North Atlantic has increased since the 1970s."

Temperature Data

Warming of the climate system is unequivocal and, since the 1950s, many of the observed changes are unprecedented over decades to millennia. The atmosphere and oceans have warmed, the amounts of snow and ice have diminished, sea level has risen, and the concentrations of greenhouse gases have increased. Thirteen out of the 14 warmest years in the global surface temperature record have occurred this century, with 2014 the warmest year overall. 2015 has continued this trend: March 2015 was the warmest March on record globally and the first four months of 2015 were the warmest January-April period on record. Climate models are consistent with these long-term trends. Over shorter time periods, natural variability in the form of volcanic eruptions, solar variability, and fluctuations in oceanic heat exchange can temporarily mask the long-term trends caused by greenhouse gases. The IPCC AR5, the NCA, and the National Research Council (NRC)[5] have all found that differences between the model average rate of warming and the observed rate of warming are explained by these factors. In addition to the temperature record, a number of other climate metrics demonstrate the continuation of this long-term trend in increasing warming. For example, according to the IPCC, the observed rate of sea level rise over the past 20 years from satellites and tide gauges is at the high end of model projections, in part due to a higher rate of melt from the Greenland and Antarctic ice sheets than had been expected. Even after taking ice sheet melt into account, the high rate of sea level rise is evidence that the oceans are warming as projected by the climate models.

Climate Impact Monitoring

Finally, regarding climate impact monitoring, as previously mentioned, the EPA continues to rely on the major scientific assessments from the NRC, the United States Global Change Research Program, and IPCC. These organizations bring together large numbers of climate science experts to synthesize the available data, modeling, and research on climate change, and subject the reports to rigorous levels of peer review. In addition, several government agencies such as the National Oceanic and Atmospheric Administration and the National Aeronautics and Space Administration perform key climate monitoring

[5] National Research Council, 2010, *America's Climate Choices: Advancing the Science of Climate Change*. The National Academies Press, Washington, DC, USA.

functions, and the Department of Energy has a dedicated program for climate model intercomparison and evaluation. The EPA and all users of this information benefit from a robust federal and academic research enterprise focused on the credibility and integrity of climate data.

United States Senate
WASHINGTON, DC 20510

June 12, 2015

The Honorable Mathy Stanislaus
Assistant Administrator
Office of Solid Waste and Emergency Response
U.S. Environmental Protection Agency
Ariel Rios Federal Building
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: Superfund Management
North Penn Area 5 Superfund Site
Operable Unit 1 – Proposed Remedial Action Plan

Dear Administrator Stanislaus:

We are concerned about the vulnerability of the Superfund program to wasteful spending at a time when federal resources are not increasing. A case in point is the proposed remedial action plan (PRAP) for Operable Unit 1 (OU 1) of the North Penn Area 5 Superfund Site in Pennsylvania.

Unfortunately for all involved, including the federal taxpayer, the remedial project managers for this site appear to have taken a checklist approach to North Penn Area 5 OU 1 without considering the actual site conditions. The Superfund National Contingency Plan (NCP) recommends treatment of principal threat wastes where practicable and establishes restoration as the goal for contaminated groundwater. However, as EPA has recognized at many sites, groundwater is often best addressed by removal of the source of contamination, and monitored natural attenuation (which is considered treatment) often can be the most effective way to address groundwater contamination.

The Pennsylvania Department of Environmental Protection has reviewed the PRAP and in a January 6, 2015 comment letter questioned Region 3's rationale for proposing a pump and treat remedy for this site. We are asking that the Headquarters Superfund program conduct a similar review. There are numerous examples of Superfund sites in Region 3 and around the country where human health and the environment are protected through a combination of source removal, monitored natural attenuation and institutional controls. It is not clear why a similar approach was not proposed for OU 1 of North Penn Area 5. In fact, it is not clear why EPA would continue to expend federal resources at this site if the state is willing to assume oversight responsibility for it.

To address the issues raised in this letter, (1) please ensure that Regional Superfund staff receives training regarding approaches to remedy selection for contaminated groundwater, (2) please ensure that Regional Project Managers are not penalized for deviating from a check list when developing remedies based on site specific conditions, (3) please review the PRAP for North Penn Area 5 OU 1 in light of EPA's remedy policies and precedents, and (4) please evaluate turning management of this site over to the state.

Please let us know the result of your review by June 30, 2015.

Sincerely,

James M. Inhofe
U.S. Senator

Pat Toomey
U.S. Senator

United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

June 24, 2015

Ann Dunkin
Chief Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code: 2810A
Washington, DC 20460

Dear Ms. Dunkin:

For more than a decade, I have called for efforts to improve the integrity of the Environmental Protection Agency's (EPA) grants programs, including EPA's online grants database.[1] While EPA has taken some steps to increase transparency and accountability within the grants program, the current grants database is not user-friendly and lacks significant information about EPA grants. As the nominee to serve as the Assistant Administrator (AA) for the EPA's Office of Environmental Information (OEI), I write to better understand the steps you are taking to ensure success in this role and to memorialize my request for reforms to EPA's online grants database.

At the outset, I am disappointed by your unfamiliarity with EPA's grants database. My Committee staff broached concerns with the grants database at a June 5, 2015, meeting with you, and as did I at your June 11, 2015, nomination hearing. As such, I was surprised by your admitted lack of familiarity with the database at our June 18, 2015, meeting in my office. Although EPA's Office of Administration and Resources Management oversees grants awarded, OEI is responsible for the technology used by EPA including the grants database website. OEI's mission is to "...ensure the quality of EPA's information, and the efficiency and reliability of EPA's technology, data collection and exchange efforts, and access services."[2] The Office of Information Analysis and Access within OEI "seeks to continuously enhance the public's access to quality environmental data and information."[3] Accordingly, as EPA's Chief Information Officer (CIO) since February 2015 and advisor to the Administrator for the last ten months, it would have been fitting for you to work on EPA's grants database.

EPA's grants program constitutes more than 40 percent of the Agency's annual budget[4] so it is equally important to ensure grant information is publicly available and comprehensive. I have made transparency of EPA's grants program a key focus during my time as the Chairman of the Committee on Environment and Public Works (EPW). In 2004, I held an EPW hearing

---

[1] *See* Grant Awards Database, Envtl. Prot. Agency, http://yosemite.epa.gov/oarm/igms_egf.nsf/HomePage?ReadForm (last visited June 24, 2015).

[2] *About the Office of Environmental Information (OEI)*, Envtl. Prot. Agency, http://www2.epa.gov/aboutepa/about-office-environmental-information-oei (last visited June 24, 2015).

[3] *Id.*

[4] *FY 2015 EPA Budget in Brief*, Envtl. Prot. Agency, http://www2.epa.gov/sites/production/files/2014-03/documents/fy15_bib.pdf (last visited June 24, 2015).

entitled "Grants Management at the Environmental Protection Agency" where the Government Accountability Office (GAO) reported a lack of specificity in how EPA oversees discretionary grants, a lack of competition among discretionary grants, and a lack of measureable outcomes, along with other issues.[5] These findings were subsequently compiled into an EPW Majority staff report entitled "Grants Management at the Environmental Protection Agency: A New Culture Required to Cure a History of Problems."[6] Ultimately these oversight efforts led to a reorganization of the EPA website as part of an effort to increase transparency and ensure accountability of EPA grants. Moving forward, I want to ensure that the Agency provides the public with comprehensive grants information on its website.

Upon reviewing the EPA grants database, my Committee staff identified several concerns with the current state of the database. According to the grants website, "EPA Grant Awards Database contains a summary record for all non-construction EPA grants awarded in the last 10 years plus grants that were awarded before that time that are still open."[7] However, the database does not appear to contain comprehensive information regarding grants awarded by EPA nor does it fully report grants awarded for the last ten years.

As one example, my Committee staff identified a lack of comprehensive information on EPA's database when conducting oversight of EPA's grant awards to the environmental activist group, Natural Resources Defense Council (NRDC). According to EPA's database, the Agency awarded NRDC two grants totaling $2,332,780 over the last ten years.[8] Yet, USAspending.gov reports that NRDC received ten grants from EPA totaling $3,900,950 over the last ten years.[9] This is a significant difference in the amount and number of grant awards reported, and can be construed as EPA misleading the public on the grants awarded to the NRDC.

Although the Agency has stated that USAspending.gov[10] is the primary way the Agency reports grant awards to the public—there is no mention of or link to USAspending.gov on EPA's

---

[5] *Grants Management at the Environmental Protection Agency:* Hearing before the U.S. S. Comm. on Environment & Pub. Works, 108th Cong. (2004).

[6] *Grants Management at the Environmental Protection Agency: A New Culture Required to Cure a History of Problems*, U.S. S. COMM. ON ENV'T & PUB. WORKS, Sept. 2004, *available at* http://www.epw.senate.gov/repwhitepapers/Grants.pdf.

[7] *Grant Awards Database*, Envtl. Prot. Agency, http://yosemite.epa.gov/oarm/igms_egf.nsf/HomePage?ReadForm (last visited June 24, 2015).

[8] EPA grants database reports two grant awards to NRDC in amount of $1,210,105 and $1,122,675. *All Awards to Non-Profits, Grant Awards Database*, Envtl. Prot. Agency, http://yosemite.epa.gov/oarm/igms_egf.nsf/Reports/Non-Profit%20Grants!OpenView&Start=999&Count=500&Expand=1312#1312 (last visited June 24, 2015).

[9] USAspending.gov reported that over the last ten years, EPA awarded NRDC ten grants in the amounts of $394,891; $353,772; $399,632; $374,012; $367,357; $383,134; $418,047; $418,047; $400,333; and $391,725. *See* https://www.usaspending.gov/Pages/AdvancedSearch.aspx?sub=y&ST=G&FY=2015,2014,2013&A=0&SS=USA&RN=Natural%20Resources%20Defense%20Council; https://www.usaspending.gov/Pages/AdvancedSearch.aspx?sub=y&ST=G&FY=2012,2011,2010&A=0&SS=USA&RN=Natural%20Resources%20Defense%20Council; https://www.usaspending.gov/Pages/AdvancedSearch.aspx?sub=y&ST=G&FY=2009,2008&A=0&SS=USA&RN=Natural%20Resources%20Defense%20Council; https://www.usaspending.gov/DownloadCenter/Pages/dataarchives.aspx.

[10] USASPENDING.GOV, https://www.usaspending.gov/Pages/Default.aspx (last visited June 24, 2015).

grants website. At a minimum, the information on EPA grants listed on its database should mirror that which is reported by USAspending.gov. Indeed, to the extent EPA is deferring its responsibility to publicly report grants awarded to USAspending.gov, Congress should be duly informed as it could have a bearing on the level of funding the Agency receives to manage its grants database.

Additionally, the database is not user-friendly and certain basic features of "advanced searches" are not working properly. The EPA grants database is not user friendly, especially when searching for specific information. The grants appear in separate lists which are broken down by type such as "all awards to non-profits" or "description of awards," with different sorting options. However, none of these options leads the user to one location where they can access all the relevant information about a grant. Users instead have to search through multiple lists of grants to attempt to obtain more comprehensive information. Furthermore, features within the "advanced search" are not properly working, making it impossible to search for grants awarded during a specific time period. The database also fails to allow users to sort search results based on the amount of the grant award.

While I understand as CIO you have hired staff to support improvements to the overall EPA website, you were unable to specify the steps the Agency will take or the timeframe for making improvements. Accordingly, my Committee staff identified several initial measures the Agency can take to begin improving the database. These suggestions include: ensuring all grants from the past ten years are, in fact, listed in the database; creating a search box at the top of each search results page; allowing users to sort each column on the search results page; adding a 'year' column to the search results page; and providing an alphabetical search menu on the search results page. I request that you consider these suggestions and provide a comprehensive plan to address my concerns with the grants database along with a corresponding schedule for achieving the plan by no later than July 10, 2015.

Thank you for your prompt attention to this important matter. If you have any questions about this request, please contact EPW Majority staff at (202) 224-6176.

Sincerely,

James M. Inhofe
Chairman
Committee on Environment and Public Works

United States Senate

WASHINGTON, DC 20510

June 12, 2015

The Honorable Mathy Stanislaus
Assistant Administrator
Office of Solid Waste and Emergency Response
U.S. Environmental Protection Agency
Ariel Rios Federal Building
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: Superfund Management
North Penn Area 5 Superfund Site
Operable Unit 1 – Proposed Remedial Action Plan

Dear Administrator Stanislaus:

We are concerned about the vulnerability of the Superfund program to wasteful spending at a time when federal resources are not increasing. A case in point is the proposed remedial action plan (PRAP) for Operable Unit 1 (OU 1) of the North Penn Area 5 Superfund Site in Pennsylvania.

Unfortunately for all involved, including the federal taxpayer, the remedial project managers for this site appear to have taken a checklist approach to North Penn Area 5 OU 1 without considering the actual site conditions. The Superfund National Contingency Plan (NCP) recommends treatment of principal threat wastes where practicable and establishes restoration as the goal for contaminated groundwater. However, as EPA has recognized at many sites, groundwater is often best addressed by removal of the source of contamination, and monitored natural attenuation (which is considered treatment) often can be the most effective way to address groundwater contamination.

The Pennsylvania Department of Environmental Protection has reviewed the PRAP and in a January 6, 2015 comment letter questioned Region 3's rationale for proposing a pump and treat remedy for this site. We are asking that the Headquarters Superfund program conduct a similar review. There are numerous examples of Superfund sites in Region 3 and around the country where human health and the environment are protected through a combination of source removal, monitored natural attenuation and institutional controls. It is not clear why a similar approach was not proposed for OU 1 of North Penn Area 5. In fact, it is not clear why EPA would continue to expend federal resources at this site if the state is willing to assume oversight responsibility for it.

To address the issues raised in this letter, (1) please ensure that Regional Superfund staff receives training regarding approaches to remedy selection for contaminated groundwater, (2) please ensure that Regional Project Managers are not penalized for deviating from a check list when developing remedies based on site specific conditions, (3) please review the PRAP for North Penn Area 5 OU 1 in light of EPA's remedy policies and precedents, and (4) please evaluate turning management of this site over to the state.

Please let us know the result of your review by June 30, 2015.

Sincerely,

James M. Inhofe
U.S. Senator

Pat Toomey
U.S. Senator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 29 2015

OFFICE OF
SOLID WASTE AND
EMERGENCY RESPONSE

The Honorable James M. Inhofe
United States Senate
Washington, D.C. 20510

Dear Senator Inhofe:

Thank you for your June 12, 2015, letter concerning the proposed amended remedy for the North Penn Area 5 Superfund Site, Operable Unit 1 (OU1), in Colmar, Pennsylvania. I appreciate the opportunity to discuss the activities at the site.

The North Penn Area 5 site is one of several contaminated groundwater and drinking water sites within the North Penn Water Authority's service area. Between 1997 and 2003, the Environmental Protection Agency (EPA) undertook a site-wide evaluation of the nature and extent of the contamination at the site. Based on the evaluation, the EPA selected a remedy for OU1 detailed in the 2004 record of decision (ROD) that required applying chemical oxidation to the source area and extracting and treating groundwater to contain the contamination plume. Subsequent to the 2004 ROD, BAE Systems, under an administrative order on consent with the EPA, performed additional investigations of groundwater contamination at OU1 and summarized its findings in a 2009 pre-design investigation report.

As a result of BAE's additional post-ROD investigations, as well as the 2011 focused feasibility study, the EPA published a proposed plan in August 2014 to amend the 2004 ROD. After thoroughly investigating and carefully evaluating the potential remedial alternatives for addressing OU1's site-specific conditions, the EPA's proposed plan recommended the selection of an optimized extraction and treatment system to address volatile organic compounds in groundwater. The EPA held an extended 90-day public comment period for this proposed ROD amendment, during which the agency received more than 1,000 pages of comments. We are carefully considering these comments as part of the remedy selection process and will present a formal response to the comments in the final ROD amendment's responsiveness summary. EPA Region 3 and EPA's headquarters Superfund program will thoroughly review the amendment and responsiveness summary to ensure both are consistent with applicable agency policy and regulation.

With respect to assessing monitored natural attenuation (MNA) as a remedy for OU1, the proposed plan included several summarized alternatives that were fully explored in the 2011 focused feasibility study, including MNA. The August 2014 proposed ROD amendment ruled

out MNA as a viable alternative based on the regulatory nine-criteria screening process for assessing potential remedies, which is established in the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). The EPA also relied upon its 1999 guidance, *Use of Monitored Natural Attenuation at Superfund, RCRA Corrective Action, and Underground Storage Tanks Sites*. Review of groundwater sampling and analysis data by EPA's Region 3, EPA's Office of Research and Development, and an optimization expert concluded that the plume is not stable nor decreasing; the plume is not currently delineated to the extent needed to select MNA; contamination likely continues to migrate; and there is likely an unidentified secondary source of contamination.

The agency continues to address groundwater contamination with cleanup strategies based on current technological and scientific information. I can assure you that the EPA's staff are well trained and knowledgeable about these technologies. While MNA is one of the potential remedial options to address contaminated groundwater, its application must be based on the conditions at the site and consistent with the NCP. The EPA proposed optimized extraction and treatment as the North Penn Area 5 OU1's amended remedy based on site-specific information and the remedy's ability to restore groundwater to Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) cleanup standards. The proposal was based on site-specific factors including: the groundwater contamination remains two orders of magnitude above the drinking water standard; the contamination is relatively shallow at 80 feet or less below ground surface; the current extraction well is not targeted to this zone of contamination; and additional extraction wells can be installed to effectively capture the plume.

Consistent with agency practice, we will ensure that the Pennsylvania Department of Environmental Protection continues to have opportunities to review and consult on this cleanup. However, the CERCLA (Superfund) statute and the memorandum of agreement between the EPA and the Pennsylvania DEP that define how both agencies exercise their cleanup authorities are clear that NPL sites are not eligible for cleanup under Pennsylvania's Act 2 program.

I hope this information is helpful. If you have any questions, please do not hesitate to contact me or your staff may contact Carolyn Levine, in EPA's Office of Congressional and Intergovernmental Relations, at levine.carolyn@epa.gov, or at 202-564-1859.

Sincerely,

Mathy Stanislaus

Mathy Stanislaus
Assistant Administrator

United States Senate
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
WASHINGTON, DC 20510–6175

July 14, 2015

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Ave., NW (1101A)
Washington, D.C. 20460

Dear Administrator McCarthy:

On March 4, 2015, you testified before the Environment and Public Works Committee. At that hearing, Senator Sullivan asked you for a legal opinion explaining the Environmental Protection Agency's (EPA's) legal rationale for the rule to revise the regulatory definition of the term ''waters of the United States'' (WOTUS).

The Committee has yet to receive a response to that request and you have now published the final WOTUS Rule. The final rule raises even more questions regarding its legality.

In fact, it appears that EPA is once again rewriting a statute to meet its policy goals despite repeated warnings from the Supreme Court against such actions.

In 1987, the Supreme Court admonished that "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States,* 480 U.S. 522, 526 (1987).

Last year, the Supreme Court warned that:

> When an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy," *Brown & Williamson*, 529 U. S., at 159, we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance." *Utility Air Regulatory Group v. EPA*, 573 U. S. ___, ___; slip op. at 19 (2014) (*UARG*).

Finally, just last month, the Supreme Court twice cited its holding in *UARG* to warn agencies that their statutory interpretations will not necessarily receive deference. In *King v. Burwell*, the

Court chose not to defer to the IRS' interpretation of the Affordable Care Act. 576 U.S. ___, ___ (2015); slip op. at 8 (June 25, 2015). In *Michigan v. EPA*, the Court said that it will not defer to the agency when it relies on unreasonable interpretations of its statutory authority:

> *Chevron* directs courts to accept an agency's reasonable resolution of an ambiguity in a statute that the agency administers. *Id.*, at 842– 843. Even under this deferential standard, however, "agencies must operate within the bounds of reasonable interpretation." *Utility Air Regulatory Group* v. *EPA*, 573 U. S. ___, ___ (2014) (slip op., at 16). 573 U.S. ___, ___ (2015); slip op. at 6 (June 29, 2015).

Based on our review of the final rule, it appears to rely on "unheralded power" that fails to fall "within the bounds of reasonable interpretation." To help the Committee understand how EPA interprets its authority under the Clean Water Act (CWA), in light of the language of the statute and Supreme Court rulings, please respond to the following questions.

Constitutional Basis for Authority

In the Technical Support Document (TSD) for the final rule EPA states that it is no longer relying on effects to interstate or foreign commerce to establish CWA jurisdiction.

> Presented with an assertion of jurisdiction under that provision of the existing rule and based on the effects of migratory birds' on interstate or foreign commerce, the Court stated in SWANCC that "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made. See, e.g., United States v. Appalachian Elec. Power Co., 311 U.S. 377, 407-408, 85 L. Ed. 243, 61 S. Ct. 291 (1940)," SWANCC at 172. In light of that statement, the agencies concluded that the general other waters provision in the existing regulation that asserted jurisdiction based on a different aspect of Congress' Commerce Clause authority – authority over activities that "could affect interstate or foreign commerce" – was not consistent with Supreme Court precedent. TSD, at 78.

Based on this statement, it appears that the final rule is based on Congress' traditional authority over navigable water. That authority is based on the authority to regulate water borne commerce. The test set forth by the Supreme Court requires a traditional navigable water to be a "highway of commerce." *The Daniel Ball*, 77 U.S. 557 (1870). According to the Supreme Court, use as a highway is the "gist of the federal test." *Utah v. United States*, 403 U.S. 9 (1971). As noted by the Supreme Court in 1865:

> Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the States or otherwise; to remove

> such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. *Gilman v. Philadelphia*, 70 U.S. 713, 724-25 (1865).

Congress' Commerce Clause authority extends to (1) channels of interstate commerce, (2) instrumentalities of interstate commerce, and (3) activities that substantially affect interstate commerce. *United States v. Lopez*, 514 U.S. 549 (1995).

Questions:

1. Please explain which prong of Commerce Clause authority EPA is relying on to promulgate the final rule.

2. If EPA is relying on Congress' traditional authority over navigable water as a channel of interstate commerce, please explain how the final rule is an exercise of this authority when none of the scientific studies cited by EPA even identify whether the waters studied are navigable or not.

3. If EPA is relying on Congress' traditional authority over navigable water as a channel of interstate commerce, please explain how the final rule is an exercise of this authority when the final rule extends to activities that do not affect navigation or interstate commerce.

4. Please explain how intrastate, geographically isolated, non-navigable water has an effect on navigable water as a highway of commerce such that it may be subject to regulation as an exercise of Congress' authority over navigation.

SWANCC

In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001) the Supreme Court ruled that the mere fact that a pond is used by "approximately 121 bird species …, including several known to depend upon aquatic environments for a significant portion of their life requirements" does not create federal jurisdiction. *SWANCC*, at 164.

Specifically, the Court stated:

> We thus decline respondents' invitation to take what they see as the next ineluctable step after Riverside Bayview Homes: holding that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under § 404(a)'s definition of "navigable waters" because they serve as habitat for migratory birds. As counsel for respondents conceded at oral argument, such a ruling would assume that "the use of the word navigable in the statute ... does not have any independent significance." [citing the oral argument transcript] We cannot agree that Congress' separate definitional use of the phrase "waters

> of the United States" constitutes a basis for reading the term "navigable waters" out of the statute. 531 U.S. at 171-172.

In *SWANCC*, the Court disallowed use of the "Migratory Bird Rule" to establish federal jurisdiction. The Court explained the "Migratory Bird Rule" as follows:

> In 1986, in an attempt to "clarify" the reach of its jurisdiction, the Corps stated that §404(a) extends to intrastate waters:
> "a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
> "b. Which are or would be used as habitat by other migratory birds which cross state lines; or
> "c. Which are or would be used as habitat for endangered species; or
> "d. Used to irrigate crops sold in interstate commerce." 51 Fed. Reg. 41217.
>
> This last promulgation has been dubbed the "Migratory Bird Rule."

SWANCC, at 164.

The holding of *SWANCC* applies to the entire "Migratory Bird Rule."

> We hold that 33 CFR § 328.3(a)(3) (1999), as clarified and applied to petitioner's balefill site pursuant to the "Migratory Bird Rule," 51 Fed. Reg. 41217 (1986), exceeds the authority granted to respondents under § 404(a) of the CWA.

Id. at 174.

Under a June 5, 2007 memorandum of agreement between the Army and EPA, a jurisdictional determination for intra-state, non-navigable, isolated waters potentially covered solely under 33 C.F.R. §328.3(a)(3) is elevated to EPA and Corps headquarters. Since the *SWANCC* decision in 2001, *no such water* has been found to be regulated under the Clean Water Act.

In *Rapanos v. United States*, 547 U.S. 715 (2006), the Supreme Court did not modify *SWANCC*. The 2008 *Rapanos* guidance states:

> It is clear ... that Justice Kennedy did not intend for the significant nexus standard to be applied in a manner that would result in assertion of jurisdiction over waters that he and the other justices determined were not jurisdictional in *SWANCC*. Nothing in this guidance should be interpreted as providing authority to assert jurisdiction over waters deemed non jurisdictional by *SWANCC*.

Under the final rule, a significant nexus (and therefore federal jurisdiction) can be established by any one of the following functions:

> (i) Sediment trapping,
> (ii) Nutrient recycling,
> (iii) Pollutant trapping, transformation, filtering, and transport,
> (iv) Retention and attenuation of flood waters,
> (v) Runoff storage,
> (vi) Contribution of flow,
> (vii) Export of organic matter,
> (viii) Export of food resources, and
> (ix) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (a)(1) through (3) of this section.

The preamble to the final rule says "non-aquatic species or species such as non-resident migratory birds do not demonstrate a life cycle dependency on the identified aquatic resources and are not evidence of biological connectivity for purposes of this rule." 80 Fed. Reg. at 37094.

However, the Technical Support Document refers 30 times to dispersal of plants (as seeds) and invertebrates (as eggs) by organisms such as birds and mammals, including the following statement:

> Plants and invertebrates can also travel by becoming attached to or consumed and excreted by waterfowl. *Id.* (citing Amezaga *et al.* 2002). Dispersal via waterfowl can occur over long distances. *Id.* (citing Mueller and van der Valk 2002). TSD, at 334.

In addition to the studies referenced above, the Technical Support Document cites such studies as:

> Roscher, J.P. 1967. "Alga Dispersal by Muskrat Intestinal Contents." *Transactions of the American Microscopical Society* 86:497-498.;
>
> Figuerola, J., *et al.* 2005. "Invertebrate Eggs Can Fly: Evidence of Waterfowl-Mediated Gene Flow in Aquatic Invertebrates." *American Naturalist* 165:274-280.
>
> Figuerola, J., and A.J. Green. 2002. "Dispersal of Aquatic Organisms by Waterbirds: A Review of Past Research and Priorities for Future Studies." *Freshwater Biology* 47:483-494.
>
> Frisch, D., *et al.* 2007. "High Dispersal Capacity of a Broad Spectrum of Aquatic Invertebrates Via Waterbirds." *Aquatic Sciences* 69:568-574.
>
> Mueller, M.H., and A.G. van der Valk. 2002. "The Potential Role of Ducks in Wetland Seed Dispersal." *Wetlands* 22:170-178.

The docket for the final rule also includes an amicus brief filed in the *SWANCC* case. (EPA-HQ-OW-2011-0880-8591 (including Likens, G. E., et al. 2000. Brief for Dr. Gene Likens et al. as Amici Curiae on Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, No. 99-1178.

Submitted by T.D. Searchinger and M.J. Bean, attorneys for Amici Curiae.). The amicus brief is cited by Justice Stevens in his *SWANCC* dissent for the proposition that many isolated waters have ecological connections to nearby waters. *SWANCC*, at 176, n.2. Thus, the ecological connections argument for jurisdiction was raised in *SWANCC*, but was rejected by the majority of the Court.

The final rule creates some exclusions, including one for "pits excavated [in dry land] for obtaining fill, sand, or gravel that fill with water."

Questions:

1. Is it your position that, after *SWANCC,* you can reasonably interpret the statute to rely on use of geographically isolated water as habitat by non-migratory birds and other species as a basis for jurisdiction as long as the species lives part of its life in a navigable water?

2. Is it your position that, after *SWANCC,* you can reasonably interpret the statute to rely on use of geographically isolated water as habitat by endangered species as a basis for jurisdiction as long as the species lives part of its life in a navigable water?

3. Is it your position that, after *SWANCC*, you can reasonably interpret the statute to rely on the ingestion of insect eggs or plant seeds by a bird or mammal in one location and the subsequent excretion of those eggs or seeds in another location as a basis for jurisdiction over geographically isolated water? When did you discover this "unheralded power?"

4. Why does EPA rely on an amicus brief cited by the dissent in *SWANCC* as support for the final rule?

5. Why is EPA relying on ecological connections to that were rejected by the *SWANCC* majority to create jurisdiction under the final rule?

6. Is it your position that by excluding "pits excavated [in dry land] for obtaining fill, sand, or gravel that fill with water" from the definition of WOTUS the final rule avoids the assertion of jurisdiction over waters that the Supreme Court determined were not jurisdictional in *SWANCC?*

7. Is it your position that *SWANCC* applies only to its facts?

Rapanos

In *Rapanos v. United States*, the Supreme Court addressed tributaries and their adjacent wetlands in a divided opinion. 547 U.S. 715 (2006). The four justice plurality held that to be subject to the CWA, water must be surface water with a relatively permanent connection to navigable water. In a concurring opinion Justice Kennedy held that to be subject to CWA jurisdiction, water must have a "significant nexus" to traditional navigable water. The four dissenting

justices argued for broader jurisdiction, based on "entwined" ecosystems. 547 U.S. at 797. None of the opinions indicated intent to overturn *SWANCC.*

Under the Supreme Court's ruling in *Marks v. United States*, 430 U.S. 188, 193 (1977), when no opinion of the Court garners a majority, "the holding of the Court may be viewed as that position taken by those Members who *concurred in the judgments on the narrowest grounds.*" *Marks*, 430 U.S. at 193 (emphasis added). The only justices who concurred in the *Rapanos* judgment were the justices who joined the plurality opinion and Justice Kennedy.

The plurality disagrees with the proposition that jurisdiction under the CWA turns on an evaluation of significant effects on the chemical, physical, and biological integrity of water.

> This is the familiar tactic of substituting the purpose of the statute for its text, freeing the Court to write a different statute that achieves the same purpose. ... It would have been an easy matter for Congress to give the Corps jurisdiction over all wetlands (or, for that matter, all dry lands) that "significantly affect the chemical, physical, and biological integrity of" waters of the United States. It did not do that, but instead explicitly limited jurisdiction to "waters of the United States. *Rapanos v. United States*, 547 U.S. 715, 755-56 (2006) (plurality).

In addition, while Justice Kennedy created a new test based on "significant effects" he did not go as far as the dissent. According to Justice Kennedy:

> When ...wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters."
>
> . . .
>
> [The dissent] concludes that the ambiguity in the phrase "navigable waters" allows the Corps to construe the statute as reaching all "non-isolated wetlands," just as it construed the Act to reach the wetlands adjacent to navigable-in-fact waters in *Riverside Bayview*, see *post*, at 11. This, though, seems incorrect. The Corps' theory of jurisdiction in these consolidated cases -- adjacency to tributaries, however remote and insubstantial -- raises concerns that go beyond the holding of *Riverside Bayview;* and so the Corps' assertion of jurisdiction cannot rest on that case.
>
> *Rapanos* at 780 (Justice Kennedy concurring).

Despite the direction of the Supreme Court in *Marks,* the final rule does not find jurisdiction only when both the plurality test and Justice Kennedy's test are met. And, despite the limitations established by Justice Kennedy, the final rule does not find jurisdiction based on significant effects on water quality. Instead, under the final rule:

> The agencies assess the significance of the nexus in terms of the CWA's objective to ''restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'' When the effects are speculative or insubstantial, the ''significant nexus'' would not be present. 80 Fed. Reg. at 37056.

This test requires no demonstration of water quality impacts, much less a demonstration of significant impacts. For example, one of the functions cited above that could establish jurisdiction is "contribution of flow." However, the final rule provides no quantification of flow. This approach is similar to the approach recommended in the *Rapanos* dissent, which was rejected by Justice Kennedy: "the dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters."

The final rule also adopts the existing Corps practice of identifying a tributary based on the presence of an ordinary high water mark (and the bed and banks that are part of the current ordinary high water mark evaluation). According to Justice Kennedy, this standard provides no assurance that a tributary (or adjacent wetlands) would significantly affect downstream navigable water.

> [T]he breadth of this standard--which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it--*precludes its adoption* as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood. Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*. Cf. Leibowitz & Nadeau, Isolated Wetlands: State-of-the-Science and Future Directions, 23 Wetlands 663, 669 (2003) (noting that isolated is generally a matter of degree.). 547 U.S. at 781-82 (emphasis added).

EPA claims that "the science" supports the new definition of waters of the United States. However, the studies referenced by EPA do not address impacts to navigable waters and most do not address water quality. Finally, none address significance even though Justice Kennedy and the Science Advisory Board panel that reviewed of the proposed rule both raised the concern that connectivity or isolation is a "matter of degree." Instead of relying on studies that show significant impacts to water quality, in the preamble EPA claims that the agencies' determination that a "significant nexus" exists is based on "scientific and policy judgment, as well as legal interpretation." 80 Fed. Reg. at 37057.

Questions

1. Is it your position that you can reasonably interpret the statute to establish jurisdiction over water absent a showing of "effects on water quality" that are not "speculative or insubstantial?"

2. Is it your position that the dispersal of seeds and eggs is an effect on water quality?

3. Is it your position that Justice Kennedy's opinion in *Rapanos* modifies the agencies' legal requirements regarding geographically isolated waters even though it did not overturn *SWANCC*?

4. When identifying waters that are jurisdictional by rule, how did EPA evaluate or quantify the significance of an effect on the quality of navigable water?

5. When identifying waters that are jurisdictional on a case-by-case basis, how will EPA evaluate or quantify the significance of an effect on the quality on navigable water?

Groundwater

The Final Rule asserts jurisdiction based on contribution of flow. The Technical Support Document is clear that flow includes groundwater. It calls groundwater a "hydrologic flowpath." *See* TSD at 129, 132, 148. For example, the Technical Support Document discussion of vernal pools states that while they "typically lack permanent inflows from or outflows to streams and other water bodies," they can be "connected temporarily to such waters via surface or shallow subsurface flow (flow through) or groundwater exchange (recharge)." TSD, at 344.

Questions

1. Is it your position that a contribution of flow that can establish a "significant nexus" under the final rule includes flow contributed through a groundwater aquifer?

2. Is it your position that a channel is *per se* a regulated tributary even if any indication of a bed, bank and ordinary high water mark ends before the channel reaches a navigable water, if the agencies allege that flow from the channel reaches a navigable water via groundwater?

3. While groundwater is not a water of the United States, what new controls over groundwater could result from this assertion? For example:

    a. Does this analysis make septic systems, such as those on Cape Cod or those built in the fossil coral of the Florida Keys, potential point sources?

    b. Does this analysis give the agencies the authority to make every feature that holds water above the Ogallala Aquifer a WOTUS on a case-by-case basis, if water from the feature infiltrates the ground and reaches that aquifer?

    c. Under the Final Rule, drinking water reservoirs and distribution systems are potentially waters of the United States. If they are leaking and that leak is recharging a groundwater aquifer, could EPA, notwithstanding water rights, object to or place conditions on a 404 permit that would now be needed to fix the leak if EPA wants that groundwater recharge to continue?

d. How would such a result be consistent with CWA § 101(g)? ("It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State.").

Flood Control

Under the final rule, retention and attenuation of flood waters, is sufficient to establish jurisdiction. Flood control is not a mission granted EPA or the Corps under the CWA. In various flood control acts, Congress gave the Corps authority to provide assistance to states and local governments to mitigate flood damages through cost-shared projects, including reservoirs and levees. The Corps' flood control authorities are not regulatory except as provided in specific acts authorizing certain non-federal reservoir projects and, under the Federal Power Act, reservoir projects operating under licenses issued by the Federal Energy Regulatory Commission. Nothing in the legislative history of the CWA suggests it includes flood control authority. In fact, when, section 101(g) was added to the Act in 1977, its sponsor stated:

> This amendment came immediately after the release of the Issue and Option Papers for the Water Resource Policy Study now being conducted by the Water Resources Council. Several of the options contained in that paper called for the use of Federal water quality legislation to effect Federal purposes that were not strictly related to water quality. Those other purposes might include, but were not limited to Federal land use planning, plant siting and production planning purposes. This "State's jurisdiction" amendment reaffirms that it is the policy of Congress that this act is to be used for *water quality purposes only.*

123 Cong. Rec. &. S19677-78, (daily ed., Dec. 15, 1977) (floor statement of Senator Wallop) (emphasis added).

Questions

1. Is it your position that the CWA authorities go beyond water quality?

2. Is it your position that the CWA authorizes EPA to exert federal control over a geographically isolated water because it can hold water?

3. If a geographically isolated water is jurisdictional based on its capacity to hold water, do you claim the authority to object to a permit that could either increase or decrease that water storage capacity, based on EPA's views of where and when water should flow, notwithstanding water rights?

Given that you have had since March 4, 2015, to prepare your legal justification for your WOTUS rule, 30 days should be ample time to respond to this letter. Please respond to these questions by August 13, 2015.

Sincerely,

James M. Inhofe
Chairman
Committee on Environment and Public Works

Dan Sullivan
Chairman
Subcommittee on Fisheries, Water and Wildlife

David Vitter
United States Senator

John Barrasso
United States Senator

Shelley Moore Capito
United States Senator

Mike Crapo
United States Senator

John Boozman
United States Senator

Jeff Sessions
United States Senator

Roger Wicker
United States Senator

Deb Fischer
United States Senator

M. Michael Rounds
United States Senator

United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510–6175

July 2, 2015

Hon. Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Dear Administrator McCarthy:

As you enter into your final deliberation on the Brick MACT, we request you give full consideration to the proposals on regulating mercury and particulate metal emissions from brick plants provided by the regulated industry. The proposals include either establishing a work practice for mercury emissions or delaying the regulation of mercury from this industry until a reasonable amount of data can be collected that demonstrate that the control of mercury is truly worth the costs that will be incurred. Standards resulting in costly and anticipated control technology must demonstrate that any costs create commensurate benefits. That does not appear to be the case here. Instead, EPA's Brick MACT regulations may shutter numerous brick manufacturing facilities.

EPA's own estimates of the potential mercury reductions from this industry are small – only 118 pounds annually. Data provided to you using Agency models demonstrate that these minimal emissions of mercury are well below EPA's established reference dose. While we are not suggesting that EPA use a full health-based approach to setting the mercury standard for brick plants, we do request that your Agency acknowledge the low impacts in its decision-making, as is allowed under Section 112(d)(4) of the Clean Air Act (CAA). The low potential of emission reduction and EPA's own models show that the benefit from regulation is extremely minor, while each control device will cost approximately $2 million – controls that have never before been used on a brick plant for mercury.

There is a compelling case and legal justification for establishing work practices instead of numeric emission limits. In their technical comments, the Brick Industry Association highlighted significant limitations that would prevent EPA Method 29 from working on a brick plant, as it was designed for plants that have significantly higher mercury emissions. As it is also a very expensive test, the economic feasibility for a small brick plant to comply with these conditions is uncertain. There is ample justification for EPA to conclude that, in light of technical and economic limitations, it is not feasible under these circumstances for a typical brick plant to demonstrate compliance with a numeric mercury emissions limitation. Such a finding would support establishing work practices standards under Section 112(h) of the CAA.

Should the EPA continue to ignore alternative methods and rely on their proposal with minimal data, roughly one-third of the small businesses that comprise the brick industry could go bankrupt or be forced to consolidate operations, costing countless jobs. Further, the technology required to control mercury emissions is not proven, requiring brick operators to seek financing for a control that may quickly become inefficient. Given the uncertainty of the technology's effectiveness, combined with the cost of the technology itself, it is concerning that the EPA plans to consider this method so readily.

This is not the only opportunity EPA will have to consider regulation of these sources, as reviews of MACT rules are required every 8 years. EPA can establish work practices that ensure data is collected to allow a full evaluation of mercury and appropriate action, if necessary. Any subsequent decision by EPA would be based on more comprehensive data and a better and thorough understanding of the issues.

The brick industry is one of the country's oldest manufacturing industries, creating thousands of jobs across the country for hardworking Americans, and it provides a product that can be seen in virtually every community. A rule that can have such tremendous impact on the brick industry, possibly requiring many brick operators to cease operations, deserves the appropriate time and consideration for all available options, and we implore the EPA to take its due diligence and carefully consider all of the critical points shared in this letter.

Sincerely,

James M. Inhofe
Chairman
Committee on Environment and Public Works

David Vitter
United States Senator

Jeff Sessions
United States Senator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

AUG - 3 2015

OFFICE OF
AIR AND RADIATION

The Honorable James M. Inhofe
Chairman
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for your letter of July 2, 2015 to U.S. Environmental Protection Agency Administrator Gina McCarthy regarding the potential economic impacts of the brick and structural clay rule that was proposed on December 18, 2014. The Administrator asked that I respond on her behalf.

The EPA is currently evaluating all of the timely comments that were received in response to the proposed rule, including comments similar to the ones you make in your letter about the projected benefits and costs of this rulemaking. We will be responding in the response to comments document, which will be available in the docket (Docket ID Number EPA-HQ-2013-0290) for the final rule when it is issued under court order by September 24, 2015. I have asked my staff to place your letter in the docket.

Again, thank you for your letter. If you have further questions, please contact me or your staff may contact Kevin Bailey in the EPA's Office of Congressional and Intergovernmental Relations at bailey.kevinj@epa.gov or (202) 564-2998.

Sincerely,

Janet G. McCabe
Acting Assistant Administrator

THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

JUL 29 2015

The Honorable James Inhofe
Chairman
Committee on Environment and Public Works
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

I am pleased to support the charter of the Clean Air Scientific Advisory Committee in accordance with the provisions of the Federal Advisory Committee Act, 5 U.S.C. App. 2. The Clean Air Scientific Advisory Committee is in the public interest and supports the U.S. Environmental Protection Agency in performing its duties and responsibilities.

I am filing the enclosed charter with the Library of Congress. The Clean Air Scientific Advisory Committee will be in effect for two years from the date it is filed with Congress. After two years, the charter may be renewed as authorized in accordance with Section 14 of FACA (5 U.S.C. App. 2 § 14).

If you have any questions or require additional information, please contact me or your staff may contact Christina Moody in EPA's Office of Congressional and Intergovernmental Relations at moody.christina@epa.gov or (202) 564-0260.

Sincerely,

Gina McCarthy

Enclosure

THE WHITE HOUSE OFFICE
REFERRAL

July 29, 2015

TO: ENVIRONMENTAL PROTECTION AGENCY

ACTION COMMENTS:

ACTION REQUESTED: APPROPRIATE ACTION

REFERRAL COMMENTS:

DESCRIPTION OF INCOMING:

ID: 1172794

MEDIA: LETTER

DOCUMENT DATE: June 11, 2015

TO: PRESIDENT OBAMA

FROM: THE HONORABLE JAMES INHOFE
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, DC 20515

SUBJECT: EXPRESSES COMMENT REGARDING THE ANNOUNCEMENT OF THE PRESIDENT INTENTION TO PROMULGATE NEW FEDERAL MANDATES REGULATING METHANE EMISSION FROM THE OIL AND NATURAL GAS SECTOR AND ASK A SERIES OF QUESTIONS RELATING TO THIS MATTER

COMMENTS: _____

_____

_____

PROMPT ACTION IS ESSENTIAL -- IF REQUIRED ACTION HAS NOT BEEN TAKEN WITHIN 9 WORKING DAYS OF RECEIPT, UNLESS OTHERWISE STATED, PLEASE TELEPHONE THE UNDERSIGNED AT (202) 456-2590.

RETURN ORIGINAL CORRESPONDENCE, WORKSHEET AND COPY OF RESPONSE (OR DRAFT) TO: DOCUMENT TRACKING UNIT, ROOM 63, OFFICE OF RECORDS MANAGEMENT - THE WHITE HOUSE, 20500

THE WHITE HOUSE
DOCUMENT MANAGEMENT AND TRACKING WORKSHEET

DATE RECEIVED: June 24, 2015 **CASE ID: 1172794**

NAME OF CORRESPONDENT: THE HONORABLE JAMES INHOFE

SUBJECT: EXPRESSES COMMENT REGARDING THE ANNOUNCEMENT OF THE PRESIDENT INTENTION TO PROMULGATE NEW FEDERAL MANDATES REGULATING METHANE EMISSION FROM THE OIL AND NATURAL GAS SECTOR AND ASK A SERIES OF QUESTIONS RELATING TO THIS MATTER

ROUTE TO: AGENCY/OFFICE	(STAFF NAME)	ACTION CODE	ACTION DATE	DISPOSITION TYPE RESPONSE	DISPOSITION CODE	DISPOSITION DATE COMPLETED
LEGISLATIVE AFFAIRS	KATIE FALLON	ORG	06/29/2015			
ACTION COMMENTS:						
ENVIRONMENTAL PROTECTION AGENCY		A	07/29/2015			
ACTION COMMENTS:						
ACTION COMMENTS:						
ACTION COMMENTS:						
ACTION COMMENTS:						

COMMENTS: 6 ADDITIONAL SIGNEES

MEDIA TYPE: LETTER **USER CODE:**

ACTION CODES	DISPOSITION		
	TYPE RESPONSE	DISPOSITION CODES	COMPLETED DATE
A = APPROPRIATE ACTION **B** = RESEARCH AND REPORT BACK **D** = DRAFT RESPONSE **I** = INFO COPY/NO ACT NECESSARY **R** = DIRECT REPLY W/ COPY **ORG** = ORIGINATING OFFICE	INITIALS OF SIGNER (W.H. STAFF) **NRN** = NO RESPONSE NEEDED **OTBE** = OVERTAKEN BY EVENTS	**A** = ANSWERED OR ACKNOWLEDGED **C** = CLOSED **X** = INTERIM REPLY	DATE OF ACKNOWLEDGEMENT OR CLOSEOUT DATE (MM/DD/YY)

KEEP THIS WORKSHEET ATTACHED TO THE ORIGINAL INCOMING LETTER AT ALL TIMES
REFER QUESTIONS TO DOCUMENT TRACKING UNIT (202)-456-2590
SEND ROUTING UPDATES AND COMPLETED RECORDS TO OFFICE OF RECORDS MANAGEMENT - DOCUMENT TRACKING UNIT ROOM 63, EEOB.

1172794

United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
WASHINGTON, DC 20510–6175

June 11, 2015

President Barack Obama
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear President Obama:

We write regarding the announcement of your intention to promulgate new federal mandates regulating methane emissions from the oil and natural gas sector and to ask a series of questions enclosed. As a result of investments in new technology, participation in voluntary programs and the business incentive to capture methane, the employees of the oil and natural gas industry continue to successfully reduce methane emissions, the main component of natural gas. Since 1990, natural gas production has increased by 37 percent, while methane emissions across the entire natural gas sector declined by 17 percent.

Simply stated, the evidence is clear that these mandatory reductions are unnecessary and will be less effective than a voluntary, cooperative effort. Greater federal regulatory burdens will complicate ongoing state efforts to reduce emissions, slow domestic energy production, and, in this instance, possibly trigger even costlier and more far-reaching rules on the sector. We therefore request that you put your proposal aside, and that the Environmental Protection Agency (EPA) postpone indefinitely proposed mandates for new and modified oil and gas sources.

The success of the oil and natural gas industry in reducing methane emissions is well-documented. In its most recent greenhouse gas emissions inventory, EPA reported that, between 2011 and 2013, methane emissions declined by 12 percent; for hydraulically fractured wells, emissions dropped by 73 percent. Estimates from academic and industry sources have reached similar conclusions.

For example, researchers at the University of Texas, along with natural gas producers, an independent scientific advisory panel, and the Environmental Defense Fund (EDF), a non-profit environmental group, demonstrated that methane emissions from natural gas production have declined by 10 percent below levels identified in a similar study conducted in 2013. EDF also sponsored a recent study by Washington State University researchers, which showed that the natural gas distribution sector, as a result of system upgrades and innovation, has also reduced methane emissions.

The industry is already undertaking compliance efforts pursuant to several EPA air pollution rules first promulgated in 2012 (and which, notably, EPA was compelled to clarify and amend

toxics standard for major sources of oil and natural gas production; and an air toxics standard for major sources of natural gas transmission and storage.

Despite the ostensible purpose of these rules to reduce hazardous air pollutants (HAPs) and volatile organic compounds (VOCs), we see an attempt to regulate methane. According to EPA's own data, while the VOC and HAP rules are expected to reduce methane emissions by over 1 million tons, EPA predicts the rules will reduce less than 20 percent of that amount for VOCs and just over 1 percent for HAPs.

As EPA acknowledged, these rules – which are not even fully implemented yet – will "yield a significant environmental co-benefit by reducing methane emissions from new and modified wells." It is therefore practically sensible to assess the results of these rulemakings, as well as ongoing voluntary and state regulatory efforts, before embarking on another series of federal mandates that could prove detrimental to job creation, energy security, and environmental progress.

Nevertheless, EPA persists in its plans for mandatory methane regulation despite notable misunderstandings concerning key facets of the industry's operations. As noted by multiple parties, EPA's five methane white papers, released in 2013, included, among other problems, numerous inaccuracies concerning data and terminology, mistaken assumptions about technologies to reduce methane and how they can be applied across producing basins. Calls to withdraw those white papers, and to collaborate with industry to correct them, went unheeded.

Now, with your announcement in January, industry faces new proposals to potentially mandate methane reductions from new and modified sources involved in nearly every aspect of oil and gas production, transmission, and delivery, including well completions, gathering and boosting stations, and compressor stations, on both public and private lands. New regulations were also announced for existing sources in ozone non-attainment areas and in states in the Ozone Transport Region. States with ozone nonattainment areas would be required to revise state implementation plans to incorporate "reasonably available control technology" standards for sources emitting VOCs.

Today, thanks to innovation by the oil and natural gas industries, coupled with practical, effective and targeted state regulation of energy production, America is now the world's largest producer of oil and natural gas, a fact that has strengthened our struggling economy at home and our geopolitical influence abroad. Yet misguided federal policies could put all that at risk. We think objective data show the industry has made remarkable progress in reducing methane emissions over the last two decades without heavy handed federal mandates. There is every reason to believe that will continue, unless restrictive federal regulations impede new technologies and cooperative state and local efforts. If the question is: "How can we continue to lower methane emissions from oil and natural gas operations?" then more federal regulations are not the answer.

****

In the interest of transparency and openness in federal rulemakings we ask your Administration will provide us with answers to the following questions concerning efforts to propose new mandates on the oil and gas industry.

1. EPA officials have not explained the basis for their legal opinion on whether establishing new source performance standard for methane under Section 111(b) of the Clean Air Act for new and modified sources requires a rulemaking for methane from existing sources under Section 111(d). Yet in EPA's proposed Clean Power Plan to establish performance standards for existing fossil-fueled power plants, EPA argued that when the agency "establishes NSPS for new sources in a particular source category, the EPA is also required under [Clean Air Act] Section 111(d)(1), to prescribe regulations. . . [for] existing sources in that source category that, in general, is not regulated under" other sections of the Clean Air Act.

    - Please provide us with EPA's legal opinion on whether direct methane regulations for oil and gas sources under 111(b) require regulation under 111(d).

2. EPA's methane proposal also includes proposals for new voluntary programs. Moreover, EPA, the Department of Energy, and the Pipeline and Hazardous Materials Safety Administration will collaborate to "develop and verify robust [industry] commitments to reduce methane emissions," which include "development of a regime for monitoring, reporting, and verification."

    - Does EPA intend to implement a level of voluntary emissions reductions that would preclude future mandates under Section 111(d)? If so, what is that level?

3. Section 111(a)(1) of the Clean Air Act provides that NSPS are to "reflect the degree of emission limitation achievable through the application of the best system of emission reduction (BSER) which (taking into account the cost of achieving such reduction and any non-air quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated." As EPA has explained, "in determining BSER, EPA typically conducts a technology review that identifies what emission reduction systems exist and how much they reduce air pollution in practice."

    - Is EPA currently conducting such a technology review?
    - What technologies is EPA considering under its BSER determination to reduce methane emissions from new and modified oil and gas sources?
    - When EPA has completed its technology review, will the agency publish it for public comment, prior to incorporating it in a 111(b) proposal for methane?
    - Further, what does EPA consider to be "reasonably available control technology" for VOCs in non-attainment areas?

4. Environmental groups are seeking an assessment of methane's climate impacts distinct from carbon emissions. These groups have petitioned EPA to measure the "social cost of methane" as part of a pending environmental review of EPA and National Highway Traffic Safety Administration's phase-2 heavy duty truck rule. According to a news

report, if the environmental groups are successful, "development of the new measure could result in a significantly larger estimate of the benefits of curbing methane from natural gas and other sources than the social cost of carbon."

- Please inform us whether, and if so, how, this measurement is being used to calculate and justify health benefits as part of EPA's NSPS proposal.
- If EPA decides to apply a "social cost of methane" in its methane rulemaking, will EPA commit to transparency as to the methodology used to create such an estimate, and provide opportunity for public comment on that methodology before EPA's NSPS is proposed?

5. Under the Clean Air Act, states are co-regulators with significant experience and expertise for effectively managing air emissions within their borders. EPA's rush to draft and finalize multiple new air rules inevitably precludes thoughtful engagement and consultation with the states. This federally centralized approach results in inaccurate data and economic impact assessments as well as poorly constructed rules, which hurts economic development and undermines the effectiveness of the rules.

    - Please provide us a detailed accounting of EPA's planned and previously held consultation with the states on its methane strategy.

Sincerely,

James M. Inhofe
Chairman
Senate Committee on Environment
and Public Works

Lisa Murkowski
Chairman
Senate Committee on Energy
and Natural Resources

David Vitter
United States Senator

John Barrasso
United States Senator

Jeff Sessions
United States Senator

Shelley Moore Capito
United States Senator

Roger Wicker
United States Senator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV 17 2015

OFFICE OF
AIR AND RADIATION

The Honorable James M. Inhofe
Chairman
Senate Committee on Environment & Public Works
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for your letter of June 11, 2015, to President Barack Obama concerning the regulation of methane in the oil and gas sector. As you know, methane has a much greater global warming potential than carbon dioxide and accounts for about ten percent of all greenhouse gas (GHG) emissions resulting from human activity in the United States. The President has asked that I respond on his behalf.

The Obama Administration is committed to addressing this source of GHG emissions, and on September 18, 2015, the EPA published in the *Federal Register* a suite of proposed commonsense requirements for the oil and gas sector that together will help combat climate change, reduce air pollution that harms public health, and provide greater certainty about Clean Air Act permitting requirements for the oil and natural gas industry. Together, these cost-effective requirements will reduce emissions from this rapidly growing industry, helping ensure that development of these energy resources is safe and responsible.

These requirements include:

- Proposed new source performance standards (NSPS) that achieve methane and volatile organic compound (VOC) reductions from across the oil and natural gas sector and call on owners/operators to find and repair leaking components. The proposed rule also extends emission reduction requirements further "downstream," covering equipment in the natural gas transmission segment of the industry for which no standards were set in the agency's 2012 rules.
- Draft control techniques guidelines for reducing VOC emissions from existing oil and gas sources in certain ozone nonattainment areas and states in the Ozone Transport Region.
- A proposed source determination rule that clarifies the EPA's air permitting rules as they apply to the oil and natural gas industry and makes them more efficient. When final, this proposal will assist permitting authorities and permit applicants in making consistent source determinations for this sector.
- A proposed federal implementation plan to implement the federal minor new source review program in Indian Country for oil and natural gas production. This federal implementation plan would be used instead of site-specific minor new source review (NSR) preconstruction permits in

Indian country and incorporates emission limits and other requirements from six standards, including the 2015 proposed updates to the NSPS for the oil and natural gas industry. These proposals are based on technologies and practices used by numerous companies throughout the industry. In developing the proposals, EPA consulted closely with states, many of whom have robust regulatory or non-regulatory programs to address emissions from these activities.

As an important part of the climate mitigation strategy, the EPA is committed to supporting voluntary efforts to reduce methane from oil and gas operations. Accordingly, we are also planning to launch by the end of 2015 an expanded voluntary program, currently proposed as the Natural Gas STAR Methane Challenge Program, to spur greater voluntary commitments and actions to reduce methane emissions.

The 60-day public comment period for the proposed suite of requirements began on September 18, 2015, and will continue through December 4, 2015. We welcome your comments on the proposed requirements. Information on how to submit comments is available at: http://www3.epa.gov/airquality/oilandgas/pdfs/comments.pdf.

Again, thank you for your letter. If you have further questions, please contact me or your staff may contact Kevin Bailey in the EPA's Office of Congressional and Intergovernmental Relations at bailey.kevinj@epa.gov or (202) 564-2998.

Sincerely,

Janet G. McCabe
Acting Assistant Administrator

United States Senate
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
WASHINGTON, DC 20510-6175

July 21, 2015

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Dear Administrator McCarthy:

We write in regards to heightened Congressional concerns with the Obama Administration's lack of transparency and accountability in developing and updating the social cost of carbon (SCC) estimates. As you are aware, the SCC is a complex figure developed by a clandestine Interagency Working Group (IWG) and cited by the Administration as the presumed cost of a ton of carbon dioxide. On July 2, 2015, the Administration released a technical update to the SCC and a response to 150 substantive public comments submitted on the estimates.[1] Despite the IWG spending over a year and four months reviewing these comments,[2] the SCC update reflected a mere $1.00 difference in the SCC estimates and provided superficial responses to public comments. Such a delayed and lax response is wholly inadequate and only compounded by the fact the Administration has obstinately withheld basic information about the IWG from Congress and the public.

In light of the far-reaching application of the SCC to federal regulations, guidance documents, permitting decisions, and even grants applications, Congressional oversight of the SCC is ever more important. As of July 13, 2015, the SCC has been cited in 114 proposed or final rules across six federal agencies and offices.[3] The Environmental Protection Agency (EPA) is one of the primary users of the SCC in its regulatory analyses. It is the linchpin of all the Agency's purported climate benefits even though the SCC is based on global benefits while the costs are borne solely by Americans.[4] Critically, despite the veil of the IWG and the

---

[1] *Response to Comments: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866.* Interagency Working Group on Social Cost of Carbon, United States Government, July 2015, *available at* https://www.whitehouse.gov/sites/default/files/omb/inforeg/scc-response-to-comments-final-july-2015.pdf

[2] Comment period ended February 26, 2014. *See* Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Exec. Order No. 12866, Notice of extension of public comment period, 79 Fed. Reg. 4359 (Jan. 27, 2014), *available at* http://www.gpo.gov/fdsys/pkg/FR-2014-01-27/pdf/2014-01605.pdf.

[3] *See* http://www.regulations.gov/#!searchResults;rpp=25;po=0;s=%2522social%252Bcost%252Bof%252Bcarbon%2522;dkt=R;dct=PR%252BFR (last visited July 14, 2015).

[4] Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34830 (June 18, 2014), *available at* http://www.gpo.gov/fdsys/pkg/FR-2014-06-18/pdf/2014-13726.pdf.

Administration's resistance to SCC transparency, we have learned that the EPA, in fact, was responsible for calculating the SCC estimates.[5] The Agency has further explained that "EPA staff from the Office of Policy (OP) and Office of Air and Radiation (OAR) provided technical expertise to the broader SCC workgroup as needed."[6] We have also identified several former or current EPA officials who directly participated in the IWG.[7] Accordingly, as an integral participant in the IWG, we are requesting corresponding documents directly from the EPA.

Congress's oversight interest in the SCC is well established. Since the May 2013 SCC update, nearly a dozen Congressional requests have been sent to the EPA, the Office of Information and Regulatory Affairs (OIRA), or other agencies and offices seeking information on the SCC. Most recently, on March 9, 2015, we sent OIRA a letter asking about the IWG's role and status in reviewing public comments, participants of the IWG, and information regarding the process used to review and potentially update the SCC estimates.[8] However, OIRA's response was insufficient, failed to provide specific information requested such as details regarding IWG participants or specifics about the review process, and outright ignored the request for documents.[9] OIRA instead provided generic information, most of which was already available on OIRA's website and included in the SCC technical support document. Congressional requests for information on the SCC during the 113th Congress yielded similarly ambiguous answers from the Administration.

In order for Congress to fully understand the development of and updates to the SCC, we request that EPA please provide, by no later than August 11, 2015, all documents and communications referring or relating to the "social cost of carbon" or the "SCC" from January 20, 2009,[10] to present.

---

[5] "EPA officials—sometimes with the assistance of the model developers—calculated the estimates." GOV'T ACCOUNTABILITY OFFICE, REGULATORY IMPACT ANALYSIS: DEVELOPMENT OF SOCIAL COST OF CARBON ESTIMATES, GAO-14-663 (July 2014), *available at* http://www.gao.gov/assets/670/665015.pdf.

[6] *Nominations of Janet G. McCabe to be the Assistant Administrator for Air and Radiation of the U.S. Environmental Protection Agency, Ann E. Dunkin to be the Assistant Administrator for Environmental Information of the U.S. Environmental Protection Agency, and Manuel H. Ehrlich, Jr., to be a Member of the Chemical Safety and Hazard Investigation Board: Hearing Before the S. Comm. on Env't & Pub. Works*, 113th Cong (Apr. 8, 2014) (Janet McCabe Response to Questions Submitted for the Record by Senator Vitter) (on file with Committee).

[7] For example, "[a]ll the authors actively participated in the interagency SCC discussion." Charles Griffiths, Elizabeth Kopits, Alex Marten, Chris Moore, Steve Newbold & Ann Wolverton, *Estimating the "Social Cost of Carbon" for Regulatory Impact Analysis*, RESOURCES FOR THE FUTURE (Nov. 8, 2010), http://www.rff.org/Publications/WPC/Pages/Estimating-the-Social-Cost-of-Carbon-for-Regulatory-Impact-Analysis.aspx.

[8] Letter from Senator James Inhofe and Republican Senators to Howard Shelanski, Administrator, Office of Information and Regulatory Affairs (Mar. 9, 2015), *available at* http://www.epw.senate.gov/public/index.cfm/press-releases-republican?ID=FC99F49F-92DA-14BE-B174-0E64E249F248.

[9] Letter from Howard Shelanski to Senator James Inhofe, Chairman, S. Comm. on Env't & Public Works (Apr. 06, 2015) (on file with Committee).

[10] According to the Government Accountability Office, the IWG was convened "[i]n early 2009." GOV'T ACCOUNTABILITY OFFICE, REGULATORY IMPACT ANALYSIS: DEVELOPMENT OF SOCIAL COST OF CARBON ESTIMATES, GAO-14-663 (July 2014) at 6, *available at* http://www.gao.gov/assets/670/665015.pdf.

Thank you for your prompt attention to this matter. If you have any questions with this request, please contact the Senate Committee on Environment and Public Works at (202) 224-6176.

Sincerely,

James M. Inhofe
Chairman

David Vitter
U.S. Senator

John Barrasso
U.S. Senator

Roy Blunt
U.S. Senator

John Boozman
U.S. Senator

Deb Fischer
U.S. Senator

Shelley Moore Capito
U.S. Senator

Bill Cassidy, M.D.
U.S. Senator

James Lankford
U.S. Senator

M. Michael Rounds
U.S. Senator

Custodians for July 21, 2015, SCC Document Request

We respectfully request any and all documents (including any and all written or electronic correspondence, electronic records, daily agendas and calendars, information about meetings and/or discussions, whether in-person or over the telephone, agendas, minutes, and a list of participants for those meetings and/or discussions, and transcripts and notes of any such meetings and/or discussions) that refer or relate to the "social cost of carbon" or the "SCC" from January 20, 2009, to July 21, 2015, that were sent or received (including receipt by carbon copy or blind carbon copy) by the following former and current EPA officials:

1. Lisa Jackson
2. Bob Perciasepe
3. Gina McCarthy
4. Bob Sussman
5. Scott Fulton
6. Avi Garbow
7. Lisa Heinzerling
8. Arvin Ganesan
9. Bernice Corman
10. Joe Goffman
11. Alex Barron
12. Michael Goo
13. Rob Brenner
14. Joel Beauvais
15. Lorie Schmidt
16. Patricia Embrey
17. Elliott Zenick
18. Paul Balserak
19. Robin Kime
20. Shannon Kenny
21. Al McGartland
22. Sara Dunham
23. Janet McCabe
24. Charles Griffiths
25. Elizabeth Kopits
26. Alex Marten
27. Chris Moore
28. Steve Newbold
29. Ann Wolverton
30. Michael Greenstone

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

AUG 11 2015

OFFICE OF POLICY

The Honorable James M. Inhofe
Chairman
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for your letter of July 21, 2015, to the U.S. Environmental Protection Agency Administrator Gina McCarthy regarding the Social Cost of Carbon (SCC). The Administrator asked that I respond on her behalf. This letter is an initial response.

Consistent with the Office of Management and Budget's (OMB) guidance, the SCC estimates are used in the EPA's analyses of regulations subject to benefit-cost analysis under E.O. 12866 and 13563 to estimate the welfare effects of quantified changes in carbon dioxide (CO_2) emissions. These estimates were developed through an Interagency Working Group (IWG) on the SCC convened by the White House Council of Economic Advisors and the Office of Management and Budget.

As noted in your letter and the EPA's response to previous letters from you on this topic, agency officials from both the Office of Policy (OP) and the Office of Air and Radiation (OAR) participated in the IWG discussions. Technical staff (economists and climate scientists) from the National Center for Environmental Economics in OP and the Office of Atmospheric Programs in OAR participated by providing technical expertise in climate science and economics to the broader workgroup as needed. For example, the professional staff economists used the modeling input parameters developed by the interagency group and oversaw the primary modeling and calculations for both the 2010 and the 2013 SCC estimates. Consistent with the Administration's commitment to transparency, the EPA has, upon request, provided to researchers and institutions more detailed model output than is presented in the 2010 or 2013 TSDs, as well as instructions, input files, and model source code.

As noted in your letter, the Government Accountability Office (GAO) completed a review of the process the IWG used to develop the SCC estimates and published a report in 2014, "Regulatory Impact Analysis: Development of Social Cost of Carbon Estimates," that discusses the participating entities, and processes and methods the IWG used to develop the 2010 and 2013 SCC estimates. After interviews with scientists and officials who participated in the development of the SCC, along with reviews of relevant technical documents, the GAO concluded that the IWG (1) used consensus-based decision-making, (2) relied on existing academic literature and modeling, and (3) took steps to disclose limitations and incorporate new information by

considering public comments and revising the estimates as updated research became available. The GAO also highlighted the various opportunities for public input on the SCC in general and the interagency estimates, including public comments received in response to numerous rulemakings. The GAO concluded that the level of documentation for this interagency exercise was equivalent to those from other comparable interagency exercises.

As your letter stated, OMB recently responded to public comments received through OMB's solicitation for comments on the SCC. The OMB comment solicitation was conducted independently from, and in addition to, multiple opportunities for comment on individual agency rulemakings. As explained in the response document, after careful evaluation of the full range of comments, the IWG concluded that the SCC estimates continue to represent the best scientific information on the impacts of climate change available for incorporating the impacts from carbon pollution into regulatory analyses and continues to recommend their use until further updates can be incorporated into the estimates.

Again, thank you for your letter. If you have further questions, please contact me or your staff may contact Josh Lewis in the EPA's Office of Congressional and Intergovernmental Relations lewis.josh@epa.gov or (202) 564-2095.

Sincerely,

Joel Beauvais
Associate Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 2 0 2016

THE ADMINISTRATOR

The Honorable James M. Inhofe
Chairman
Committee on Environment and Public Works
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

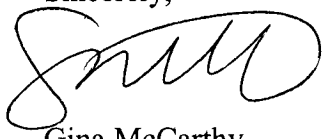
The Administration commends the Senate Environment and Public Works Committee and the House Energy and Commerce Committee on their bipartisan efforts to pass Toxic Substances Control Act (TSCA) reform legislation. In 2009, the Administration released Essential Principles for Reform of Chemicals Management Legislation (Principles) to help inform Congressional efforts on TSCA. The Administration is pleased to share the additional views in this letter, and would welcome the opportunity to work with Congress on more technical drafting issues during the reconciliation process.

Under TSCA, insufficient progress has been made in determining whether the tens of thousands of chemicals in commerce today are safe for the American people and the environment. When TSCA was enacted, it grandfathered in, without any evaluation, over 60,000 chemicals that were in commerce at the time. TSCA did not impose any requirement or schedule for the EPA to review these chemicals for safety. Even for chemicals with known risks, TSCA's "unreasonable risk" standard and "least burdensome" regulatory requirement have generally prevented the EPA from taking necessary and timely actions to protect human health and the environment.

The Administration appreciates that Congress took a comprehensive look at TSCA when it developed its reform bills. While there are many aspects to overhauling TSCA, the Administration encourages Congress to ensure several important issues are addressed sufficiently in any legislation to emerge from the reconciliation process. The views provided in the attachment are intended to assist Congress in reconciling the two pieces of legislation. The lack of a workable safety standard, deadlines to review and act on existing chemicals, and a consistent source of funding are all fundamental flaws in TSCA that should be addressed.

The Administration strongly supports Congress's efforts to strengthen TSCA to provide the EPA with the necessary tools and authorities to target and assess chemicals, and effectively regulate risks. Chemicals are vital to our nation's economy, but safety should continue to be of paramount importance. We need to restore confidence that chemicals used in commerce will not endanger the health and welfare of the American people. The Administration looks forward to continuing to work with Congress toward these goals.

Sincerely,



Gina McCarthy

Enclosure

Identical letters sent to the Honorable James M. Inhofe, The Honorable Barbara Boxer, The Honorable Fred Upton, and the Honorable Frank Pallone Jr.

Administration Views on the TSCA Reform Bills (H.R. 2576 and S. 697)

Deadlines for Action

Essential to a reformed TSCA are statutory mechanisms that drive EPA action to review chemicals and regulate those that are unsafe. In its Principles, the Administration calls for "clear, enforceable and practicable deadlines."

On this point, the Senate bill is preferable. It provides certainty about the progress that the EPA is required to make reviewing chemicals. The Senate bill imposes an absolute requirement to have completed or at least begun a certain number of assessments (20 high-priority assessments within 3 years, and 25 high-priority assessments within 5 years), and imposes a requirement to repopulate the high-priority list as each assessment is completed until all chemicals on the TSCA inventory have been evaluated.

Elimination of the "Least Burdensome" Requirement

The Administration supports the elimination of current TSCA's "least burdensome" requirement, which the court in *Corrosion Proof Fittings* – an often-cited TSCA case – has interpreted to impose a tremendous analytical burden on the agency. The EPA's failure to meet this requirement – after over a decade of rulemaking and thousands of pages of analytical record – resulted in the overturning of the asbestos rule. Both the House and Senate bills include new, different considerations for the EPA when selecting among risk management measures ("Analysis for Rulemaking" in Section 6(d)(4) of TSCA as amended by the Senate bill and "Requirements for Rule" at Section 6(c)(1)(B) of TSCA as amended by the House bill).

Whatever the resolution, the Administration urges Congress to establish considerations that are sufficiently circumscribed so that the EPA will not be required to assess the costs and benefits of an indefinite number of regulatory alternatives, or otherwise be obligated to pursue alternatives analyses beyond the realm of analytic practicability. Such requirements would likely undermine the operation of a revised law even if it contains a clear safety standard and practicable deadlines.

The Administration prefers the consideration requirements under the Senate bill because they expressly provide that they do not extend the EPA's analytical burden beyond what can be practicably accomplished, based on reasonably available information. Subject to these bounds, the EPA would be required to consider the costs and benefits of alternative methods to achieve the safety standard for a particular chemical substance. The EPA would also be required to incorporate such consideration into a statement accompanying each risk management rule, which would then be part of the administrative record for the rule, and thus allow for judicial review of the adequacy of the agency's reasoning.

By contrast, the House bill requires the EPA to defend one of two affirmative alternative findings in order to issue a risk management rule: either that the rule is cost effective or that a non-cost effective alternative is necessary. The scope of analysis required for making these findings may be bounded by the information that is "reasonably ascertainable," under section

6(c)(1)(A). Even if the analysis is so bounded, this provision leaves uncertainty about how many cost effective options the EPA would have to analyze and reject as inadequate before selecting a non-cost effective option.

Prioritizing Chemicals for Review

The Administration's Principles make clear that the EPA should have the authority to prioritize chemicals for review based on relevant risk and exposure considerations. Both the House and Senate bills also include provisions that would allow manufacturers to identify their own priority chemicals for review by the EPA. If a similar mechanism is included in a final bill, it is essential that it not overrun the EPA's ability to prioritize chemical reviews. For this reason, the Administration strongly prefers the Senate version since that bill explicitly caps the number of risk evaluations that can be initiated based solely on manufacturers' interest and it requires both full payment of the costs of the assessment and, if necessary, defrayment of the ensuing costs to develop risk management regulation. Without a meaningful cap or similar measures, manufacturer priorities have the potential to overrun the EPA's chemicals management program and prevent the agency from addressing chemicals with greater potential risks. Without appropriate funding for risk management costs, the EPA may not be able to complete work on manufacturer priorities as Congress presumably intended. The House bill has no cap on manufacturer initiated risk evaluations, and no requirement for industry to pay for the risk management actions that the EPA may find itself legally obligated to undertake after completing the requested risk evaluations. The House language would allow the EPA to put risk evaluations on hold if it receives more industry requests than it has resources to handle, but this provision could be interpreted to allow the EPA to put on hold *EPA initiated evaluations* as well as manufacturer initiated evaluations.

Sustained Source of Funding

The Administration's Principles state that the EPA work under TSCA should be "adequately and consistently funded" and that manufacturers should "support the costs of Agency implementation." The Administration is pleased that both the House and Senate modify Section 26 to establish a dedicated TSCA implementation fund and expand fee collection authority.

The House bill's fee provisions would not defray the EPA's costs of reviewing existing chemicals (aside from those initiated by industry) or any of the costs associated with regulatory risk management actions. It could also be argued that the fees that the EPA could collect for the submission of test data would not cover the EPA's costs to assess the data as part of a chemical risk evaluation.

The Administration prefers the Senate bill's funding provisions, which explicitly add new fee collection authority for the costs of reviewing confidential business information (CBI) claims, reviewing notices under section 5, making prioritization decisions, conducting and completing safety assessments, and conducting rulemakings.

The EPA should have broad authority to use its fees to cover the costs of agency implementation. Giving the EPA this authority generally would avoid the concerns raised above about the EPA's spending authority in specific scenarios. Further, imposing spending caps and the Senate bill's minimum appropriations requirements for assessing fees could still create implementation challenges.

Implementation Challenges

The Administration encourages Congress not to impose on the EPA extensive, prescriptive requirements to develop policy and procedure documents. The dedication of resources to meeting these process development expectations could frustrate the EPA's efforts to timely and directly implement the substantive requirements of TSCA.

The Senate bill, particularly in sections 3A and 4A, establishes pressing deadlines for the EPA to develop various policy and procedure documents, and prescribes numerous specifications for the content of such documents. Meeting these document generation requirements may unnecessarily slow progress on more substantive issues, limit the EPA's flexibility to allocate resources appropriately, and lead to burdensome litigation regarding the process development requirements.

The EPA has already developed and promulgated numerous policies, procedures, and scientific guidances. The EPA continues to invest resources in hosting open public debate on pressing scientific issues and the development of policies and guidances, and does so in accordance with existing objectivity and transparency requirements. For highly impactful or controversial issues, the EPA continues to engage the National Academies of Science, Engineering and Medicine to ensure the development of robust policies and procedures.

The Administration strongly prefers the House bill on this matter since it only requires the EPA to develop new policies, procedures, and guidelines to the extent necessary. If the detailed procedural specifications of the Senate bill are retained, the Administration supports also retaining the accompanying savings provisions that the Senate bill adds to TSCA Section 6(b), which allow the EPA to continue its ongoing work to protect public health and the environment while the required policies, procedures and guideline are under development.

Safety Standard

The Administration's Principles call for a new safety standard that is "based on sound science and reflect[s] risk-based criteria protective of human health." The Administration encourages Congress to apply the new safety standard consistently throughout the revised statute.

If a clear directive for the EPA to apply the new safety standard is expressed only with respect to section 6, as is the case in the House bill, that could create uncertainty as to what standard would apply to EPA actions under other provisions of TSCA where the phrase "unreasonable risk" appears (for example, under sections 4, 5, 7, 12 and 14). Providing an upfront definition of the safety standard, as in the Senate bill, is one way to better ensure uniform

application of the new standard to all actions under TSCA. Alternatively, "unreasonable risk" could be redefined in each instance it appears.

On a related point, there are several provisions in section 6 of the House bill that could possibly be read to suggest that different standards apply in section 6(a) rulemakings in different scenarios. For example, the EPA is authorized to promulgate non-cost-effective requirements if "necessary to protect against the identified risk" (section 6(c)(1)(B)). It might be argued that this language provides a different risk management standard from section 6(a) (regulation must ensure that a chemical substance "no longer presents or will present an unreasonable risk"). A similar issue appears with respect to regulation of replacement parts (section 6(c)(1)(D)) and articles (section 6(c)(1)(E)).

In general, the Administration appreciates that both the House and Senate bills allow for exemptions to otherwise applicable risk management requirements where necessary to maintain a critical use, or to protect national security or avoid disruption to the national economy. This is consistent with Administration Principle 3, which states that risk management decisions should take into account sensitive subpopulations, cost, availability of substitutes and other relevant considerations. This principle should be consistent across the relevant risk management provisions of the bills.

Finally, some confusion might be caused by the House bill provision that requires rulemaking for persistent, bioaccumulative and toxic (PBT) chemicals under section 6(a) to reduce likely exposure to the extent practicable (section 6(i)(3)). Sections 6(a) and 6(i) actually impose different rulemaking standards. Both the section 6(a) rulemaking standard and several of the considerations required in promulgating section 6(a) rules (which appear in section 6(c)) assume that the EPA has identified specific risks as unreasonable. However, the EPA may not have actually performed a risk evaluation for a particular PBT which is required (under section 6(i)) to be the subject of a 6(a) risk management rulemaking.

Regulatory Flexibility

The House bill retains the current TSCA section 6(a) menu of requirements the EPA can impose in section 6 rulemakings. Although this menu is extensive, it is not comprehensive. Specifically, the menu expressly authorizes the EPA to regulate the manufacture, processing and distribution in commerce of a chemical substance only through a complete ban or ban for specific uses, or through quantity or concentration limitations. In contrast, with respect to commercial use, section 6(a) gives the EPA broader authority to impose requirements "prohibiting *or otherwise regulating*" the use (section 6(a)(5)). In operation, this menu may drive regulation that is more burdensome than necessary. The Administration prefers the approach in section 6(d) of the Senate bill, which includes "catch-all" regulatory authorities.

Safety of New Chemicals

Under current TSCA, manufacturing and processing of new chemicals can commence upon expiration of the premanufacture notice review period without the EPA determining whether or not those chemicals are safe. As stated in the Administration's Principles 2 and 4, the

EPA should conclude whether or not new chemicals meet the safety standard before those chemicals are allowed to enter the market. As such, the Administration supports the Senate bill requirement that the EPA make an affirmative safety determination regarding new chemicals.

Transparency and Confidential Business Information

The Administration's Principles outline certain improvements regarding the transparency of chemical information. The Administration is pleased that both the House and Senate make improvements to substantiation requirements for CBI claims. The House bill requires substantiation of new CBI claims, while the Senate bill requires substantiation of both new and existing claims. The Administration also supports new authority in both bills for the EPA to appropriately share CBI with others when necessary to protect public health and safety.

However, the Administration is concerned with a provision in the House bill that would allow "formulas (including molecular structures)" of a chemical substance to be withheld as CBI in health and safety studies. Under current section 14, formula information in health and safety studies can be protected as CBI only if it discloses process information. Thus, the House provision would decrease transparency and shield from the public relevant chemical information (in some cases, the specific identity of a chemical that is the subject of a health and safety study).

Authority to Require Development of Information

Another significant problem under current TSCA is the difficulty of requiring the development of information on chemicals for which information is lacking. Both bills address a major contributor to this problem: the lack of authority to require testing by order. The other contributor is substantive: section 4 of TSCA currently requires the EPA to either demonstrate that a chemical "may present an unreasonable risk," before it can require testing, or else that there is already substantial production and substantial release of or exposure to the chemical substance. The obligation to make these demonstrations has created difficulties for the EPA in requiring testing necessary to assess the safety of chemicals.

Both the House and Senate bills give the EPA new authority to require testing for specific purposes, including during risk evaluations. Under the new House authority, however, the EPA must first make a risk-based finding before initiating a risk evaluation. Although the bar is fairly low ("may present an unreasonable risk...because of potential hazard and a potential route of exposure..."), it could have the effect of perpetuating the difficulties the EPA has encountered under current TSCA. Outside of the risk evaluation context, the House bill could still require the EPA to make a "may present an unreasonable risk" finding before requiring testing under section 4. The Administration encourages Congress to ensure that the EPA is given the necessary authority and tools to obtain information relevant to determining the safety of chemicals.

Chemicals in Articles

The Administration encourages Congress to look closely at provisions in both the Senate and House bills that may make it more difficult for the EPA to review and regulate risks from chemicals contained in articles. Under current TSCA, the EPA has used its authority under

section 5 to establish notification requirements for new uses of a chemical for which the EPA has concerns, including chemicals in imported articles. Section 5 does not require the EPA to make any particular exposure or hazard finding to use this authority, presumably since the function of these significant new use rules is simply to allow the EPA to review, and regulate as necessary, new uses of existing chemicals on the same basis as new chemicals. The Senate bill imposes a new requirement: the EPA must first find the notification requirement for the article is warranted based on "the reasonable potential for exposure through the article or category of articles." This new requirement may make it harder for the EPA to require notification for uses that are not currently foreseen. Even for currently envisioned uses, it may generate litigation over an EPA finding that the potential for exposure through an article or category of articles is "reasonable". The House bill exempts from regulation all "replacement parts designed prior to" the publication of a risk management rule, unless the replacement parts "contribute significantly to the identified risk." This provision would make it more difficult for the EPA to define the scope of regulations given the likely challenges of determining when particular replacement parts were designed.

Enforcement Improvements

While the Administration's Principles do not discuss civil and criminal enforcement of TSCA, the Administration supports the decision to include provisions in the Senate bill that would strengthen civil and criminal enforcement authorities. We look forward to continuing to work with Congress on these provisions.

Federal-State Relationship

The EPA's limited ability to regulate under TSCA has encouraged states to step in, resulting in varying chemical regulations across the country. Assuming the flaws in TSCA that have prevented effective federal action are addressed in reform legislation, the Administration supports an approach to preemption that provides a consistent regulatory regime for industry while allowing appropriate additional actions by the states. These comments are intended to note provisions that could benefit from drafting changes to reflect Congress's presumed intent, as well as provisions that could result in permanent preemption of state actions to address risks not addressed by federal regulation.

The Administration supports Congress's intent to preserve existing state laws like California's Proposition 65, and other state environmental laws related to the protection of air and water, and to waste. Respecting the preservation of such laws, both the Senate and House bills would benefit from further work to reflect the drafters' intent. For example, the Senate bill should better reflect its apparent intent to preserve state regulations adopted prior to August 1, 2015, not merely to enforce actions initiated prior to August 1, 2015. Similarly, the House bill should clarify that it is wholly preserving the identified laws, not just State efforts "to continue to enforce" those laws, and also that any state requirement enacted under a law that was in effect on August 31, 2003, is saved from preemption, even if the specific requirement is promulgated after the date of the TSCA Modernization Act.

The House bill should also clarify the scope of potential preemption of state environmental laws that "actually conflict[]" with an EPA "action or determination." While two

laws might be said to actually conflict if they impose incompatible obligations or one purports to abrogate the other, it is far less clear when a state law could be said to be in actual conflict with an EPA determination that is not an action, or with an EPA action that does not impose requirements.

Respecting the preservation of state laws adopted under the authority of federal law, the Administration supports the Senate bill's clarification of the types of state laws that are intended to receive such protection from preemption. Specifically, the Senate bill makes clear that this protection also extends to laws that a state adopts using its own legal authority, but that are nonetheless authorized under federal law, or adopted to satisfy or obtain authorization or approval under federal law. This clarification furthers a common sense objective: to ensure that TSCA actions do not block the purposes of the many other federal environmental statutes (e.g., the Clean Air Act) that are implemented through a system of cooperative federalism. The Senate bill's clarification is also consistent with evidence of original Congressional intent, found in TSCA's legislative history.

Furthermore, the Administration supports an approach in which any preemption resulting from a completed EPA safety assessment or risk management rule is appropriately limited to the particular risks that the agency actually considered in the scope of that assessment or rulemaking. The Administration prefers the Senate bill's clarity on this issue. On a related issue, the House bill, which does not require an affirmative safety determination for new chemicals, nonetheless would lead to preemption of state regulation for all uses of a new chemical substance identified in a pre-manufacture notification, if the agency took action merely to address a subset of those uses.

United States Senate
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
WASHINGTON, DC 20510-6175

August 20, 2015

The Honorable Jo Ellen Darcy
Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, D.C. 20310-0108

Mr. Ken Kopocis
Deputy Assistant Administrator
Office of Water
U.S. Environmental Protection Agency
Mail code 4101M
1200 Pennsylvania Avenue NW
Washington, DC 20460

Dear Secretary Darcy and Mr. Kopocis,

You are well aware of my deep concerns regarding the revisions to the regulatory definition of the term "waters of the United States" under the Federal Water Pollution Control Act recently promulgated by the Army and the Environmental Protection Agency. 80 Fed. Reg. 37,054 (Jun. 29, 2015). From claiming jurisdiction based on groundwater aquifers or the dispersal of seeds and insect eggs through bird droppings --- to the use of aerial photographs and ground level radar to identify the current or historic presence of a stream channel -- it seems as if each day uncovers yet another extreme and novel expansion of federal authority hidden in this rule.

It has recently been brought to my attention that under your new rule the Army and EPA are claiming the authority to regulate not only current streams and wetlands, but land where streams and wetlands may have existed long before the enactment of the Clean Water Act. If you had adequately consulted with local governments before developing this rule, you would have known that many years ago it was common practice to construct city sewer and stormwater systems in existing streams. Under your radical expansion of federal regulatory authority, these sewer and stormwater systems could now be regulated as waters of the United States, precluding their use to protect the public health and welfare of city residents.

According to the Questions and Answers on EPA's website: "Dry land is those areas that are not water features, such as streams, wetlands, lakes, ponds, and the like."[1] According to the preamble to the final rule, the agencies consider an area to be a "water feature" based on the historic, as well as current, presence of water. The preamble further states: "***Agency staff can determine historical presence of tributaries using a variety of resources, such as historical maps, historic aerial photographs***, local surface water management plans, street maintenance data, wetlands and conservation programs and plans, as well as functional assessments and monitoring efforts." 80 Fed. Reg. at 37,078-79; *see also id.* at 37,098.

[1] http://www2.epa.gov/cleanwaterrule/technical-questions-and-answers-implementation-clean-water-rule

The final rule definition of "tributary" includes water that flows through manmade features "such as bridges, culverts, ***pipes***, dams, or ***waste treatment systems***" and "relocated" streams. *Id.* at 37,078, 37,098. The final rule exemptions for stormwater control features only cover features that are created in dry land. The final rule exemptions for ditches that provide flow to navigable waters do not cover ditches excavated in a tributary or that relocate a tributary. Many stormwater and sewer systems were built in areas that under the new rule may be considered "tributaries." Since they are not covered by the exclusions for ditches and stormwater management features, they may be regulated "waters of the United States."

To demonstrate the extreme nature of that position, I would like to draw your attention to the history of the District of Columbia. Historical maps show the presence of former streams throughout Washington, D.C.[2] Historical photos show the Washington Canal along what is now Constitution Avenue.[3] Historical accounts provide the following information:

> "The Washington Canal has been entombed as an ***underground sewer*** when once it coursed down Constitution Avenue and emptied into the Anacostia River near the Navy Yard. All that remains today is a lock keeper's house on Constitution Avenue."[4]
>
> "A half a mile below Rock Creek, a stream named ***the Tiber flowed across tidal flats and comprised a marshy estuary in front of where the White House and executive mansion now stands at the base of what is now Capitol Hill. Tiber Creek was an estuary, also called Goose Creek, that originated in an extensive watershed in northeast Washington in what is now the area around Florida Avenue Northeast.*** The Tiber was a treacherous waterway, known for flash floods during heavy rains..."[5]
>
> "***The Tiber was navigable*** at ten feet deep for small boats up to what is now Florida Avenue."[6]
>
> "The [Washington] canal was a diagonal that ***began at James Creek at Buzzards Point and met the Tiber estuary on the Mall,*** a bit south of today's Pennsylvania Avenue. The ***canal opened on the Potomac*** at the foot of Seventeenth Street Northwest."[7]
>
> "***Tiber Creek was ultimately paved over and turned into an underground sewer. The remains of the Washington Canal were filled in to become Constitution Avenue.***"[8]
>
> "The Washington Canal was opened in 1815, a year after the British burned the capital during the War of 1812. ***It started at the Potomac just below the White House at Tiber***

---

[2] *See* map of streams from 1861, available at: http://parkviewdc.com/2011/09/08/hidden-washington-tiber-creek/
[3] *See* photos, available at: http://civilwarwashingtondc1861-1865.blogspot.com/2012/04/washington-canal-cesspool-in-midst-of.html
[4] Wennersten, The Historic Waterfront of Washington D.C., The History Press (2014), at 28.
[5] *Id.* at 29.
[6] *Id.*
[7] *Id.* at 54.
[8] *Id.* at 80.

Creek and then headed east along what is now Constitution Avenue. Near the Capitol, it turned southeast down to the Navy Yard. The canal was filled in and is now Constitution Avenue."[9]

"To the Northwest, streams flowed down the sides of Petworth and Rock Creek Church yard to Piney Branch. To the Northeast, small streams trickled down the steep hills to Northwest Branch of the Anacostia River, while ***many brooks on the Southern slopes of these hills united at what is now First and S Streets Northwest*** and back of old St. Patrick's grave yard site and Moore's lane to form the upper end of Tiber Creek."[10]

"Below Florida Avenue or old Boundary Street and ***in O Street between North Capitol and 1st Street, Reedy Branch joined Tiber*** and deflected it to the East, crossing North Capitol Street above N street."[11]

"From the Northwest flowed ***Reedy Branch*** that had its source as late as twenty-five years ago near 13th Street and Columbia Road and ***took a Southeasterly course towards Sheridan Avenue,*** cutting deep scars in the rolling landscape and forming a lake or marsh at about where the Wilson High School now stands, at Eleventh and Harvard Streets, and whose waters now seep into the basement of that building after a rainy spell." [12]

"***Before the coming of street improvements, sewers and houses,*** this little branch crossed Florida Avenue at Eighth Street and meandered through the plain collecting waters from springs as far West as 14th Street and crossing Seventh Street near R Street and joining Tiber near First and O Streets."[13]

"From the Eastward ***a small stream was formed by two branches at 9th and H Streets from Kendall Green and Trinidad and joined Tiber at a point in front of the present Post Office building at Massachusetts Avenue and North Capitol Street.***"[14]

"The Park View and Grace Dodge Hotels are built over the valley of Tiber Creek while ***Union Station is built over the bed of the little stream from the East.***"[15]

"One more branch started at Willow Tree Spring North of New York Avenue between 4th and 5th Streets and flowed due South to Judiciary Square and turned Southeasterly ***down Indiana Avenue to join Tiber at Second Street.***" [16]

---

[9] Peck, The Potomac River: A History and Guide, The History Press (2012), at 101.
[10] Duhamel, Tiber Creek, Records of the Columbia Historical Society. Washington, D.C., vol. 28 (1926), at 205.
[11] *Id.*
[12] *Id.* at 206.
[13] *Id.*
[14] *Id.* at 207.
[15] *Id.*
[16] *Id.*

> "***From the present Post Office site Tiber Creek followed a substantially southwesterly course to the Botanical Gardens and then formed a wide shallow bay running due West to the Potomac.***"[17]
>
> "One of the most popular and useful springs in early Washington history was the one in what is now Franklin Park and which Sessford says yielded several barrels of water per minute. The stream from this spring flowed Southeastward to the corner of 13th and H Streets and turned Eastward back of the Orphan Asylum, Old Ascension Church and the Van Ness Mausoleum between 9th and 10th Streets and then turned Southward along the edge of the hill on which the Patent Office stands and which was graded twice, in 1840 and 1870. ***This stream joined Tiber at 10th or 11th Street and its bed formed the dock of the old canal at that point.***"[18]
>
> "***A second stream that crossed Pennsylvania Avenue to join the Tiber, had its origin at the foot of the hill on which the City Hall stands*** and which not only supplied the adjacent baths on C Street, back of the National Hotel, but also the several hotels in the neighborhood with water."[19]
>
> "***A very small stream did flow from the Octagon House Southwestward and into the river near the Glass House at 22d Street***, and this seems to have been the only spring South of G Street and West of 17th Street, together with one at Easby's Point.[20]
>
> "***From the Willow Tree Spring Branch that ran through Judiciary Square and Indiana Avenue,*** some 2,500 feet of iron pipe were connected in 1821 and a reservoir was built in 1828 at the corner of the latter avenue and 3d Street, from which water was carried as far as Pennsylvania Avenue and 10th Street. Remains of this reservoir could be seen as late as 1885 at the corner referred to before the houses that now stand thereon were built."[21]

Based on this historic information, and the language from the preamble to the final rule, is the D.C. sewer system below Constitution Avenue a buried stream that is considered a water of the United States? Is the stormwater collection system beneath Constitution Avenue a water of the United States? The headwaters of Tiber Creek can still be seen.[22] Is the Flager Place Trunk Sewer that follows the path of one of the former branches of Tiber Creek a water of the

---

[17] *Id.* at 208.
[18] *Id.* at 210.
[19] *Id.* at 211.
[20] *Id.* at 219.
[21] *Id.*
[22] http://parkviewdc.com/2011/09/08/hidden-washington-tiber-creek/

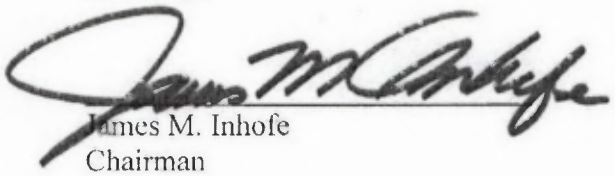
United States?[23] In D.C., many sewers were built before 1930, well before the enactment of the Clean Water Act.[24] If built in a former stream, are these sewers also waters of the United States?

If you believe that these sewers are exempt waste treatment systems, please explain how a stormwater system that does not meet the terms of the specific exclusion for stormwater control features can be exempt under the more general waste treatment system exemption. Doesn't that fly in the face of rules of interpretation under which a general provision does not apply if the matter is dealt with more specifically in another provision? Also, please explain how a sewer installed before 1930 meets the condition that it be "designed to meet the requirements of the Clean Water Act." If any wastewater or stormwater management system, no matter when built, is considered to be "designed to meet the requirements of the Clean Water Act," please assure me that this interpretation applies to all waste treatment systems.

Finally, there are unexplained changes to the exclusions between the proposed and final rules. Please explain to me why the definitions of "waters of the United States" at 40 C.F.R. 112.2, 40 C.F.R. 116.3, 40 C.F.R. 302.3, and 40 C.F.R. 401.11 do not exclude waste treatment systems, as was proposed. Please explain to me why the proposed rule would have provided exclusions from all parts of the waters of the United States definition, but under the final rule the exclusions do not apply to navigable or interstate waters. Do the Army and EPA claim the authority to regulate ditches that meet the terms of an exemption but cross state lines, such as ditches along interstate highways? Do the Army and EPA intend to regulate artificial, constructed lakes and ponds created in dry land if they can float a kayak?

These questions demonstrate the grave concerns that many local governments have regarding your final rule, which I share. Thank you for your prompt attention to them. If you have any questions, please contact the Senate Committee on Environment and Public Works Majority Office at (202) 224-6176.

Sincerely,



James M. Inhofe
Chairman

Cc: Tom Cochran, CEO and Executive Officer, U.S. Conference of Mayors
Matthew Chase, Executive Director, National Association of Counties
Clarence Anthony, Executive Director, National League of Cities
George Hawkins, CEO and General Manager, D.C. Water
Adam Krantz, CEO, National Association of Clean Water Agencies

---

[23] http://imaginaryterrain.com/blog/2013/07/streams/.
[24] https://www.dcwater.com/news/testimony/2013_testimony_of_charles_kiely.cfm

MAR - 8 2016

The Honorable James Inhofe
Chairman
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Chairman Inhofe:

Thank you for your August 20, 2015, letter regarding the Department of the Army/Environmental Protection Agency ("the agencies") Clean Water Rule defining the scope of Clean Water Act jurisdiction. Since October 9, 2015, the Clean Water Rule has been stayed under a decision of the U.S. Court of Appeals for the Sixth Circuit pending further action of the court.

The Clean Water Rule will not expand existing jurisdiction over stormwater systems or storm sewers. The agencies worked hard, in consultation with state and local governments, to identify for the first time in regulation the scope of stormwater systems that are never jurisdictional. The effect of the Rule will be to ensure that any stormwater feature that was not jurisdictional before the Rule remains outside the scope of the Clean Water Act when the stay is lifted. The Rule will ensure greater consistency and predictability nationwide in the process of identifying waters subject to the statute as well as features excluded from jurisdiction.

The agencies' longstanding practice is to view stormwater control measures that are not built in "waters of the United States" as non-jurisdictional. Certain features, such as curbs and gutters or ditches and ponds built in uplands, may be features of stormwater collection systems, but have never been considered "waters of the United States." Nothing in the Rule would change that practice.

Thank you again for your letter. Please feel free to contact us if you have any questions on this important issue, or your staff may contact Denis Borum in the Environmental Protection Agency's Office of Congressional and Intergovernmental Relations at borum.denis@epa.gov or (202) 564-4836; or Gib Owen in the Office of the Assistant Secretary of the Army (Civil Works) at gib.a.owen.civ@mail.mil or (703) 695-4641.

Sincerely,

Joel Beauvais
Deputy Assistant Administrator for Water
U.S. Environmental Protection Agency

Jo-Ellen Darcy
Assistant Secretary for Civil Works
U.S. Department of the Army

United States Senate
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
WASHINGTON, DC

March 23, 2015

Ms. Gina McCarthy
Administrator
Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington, DC 20460

Dear Administrator McCarthy

On behalf of the Senate Committee on Environment and Public Works, we would like to thank you for testifying before the Committee on Wednesday, March 4, 2015. The committee greatly appreciates your attendance and participation in this hearing to examine the Environmental Protection Agency Budget.

In order to maximize the opportunity for communication between you and the Committee, follow-up questions have been submitted by the members. We ask that you respond to each member's request in one typed document. To comply with Committee rules, please e-mail a copy of your responses to Elizabeth_Olsen@epw.senate.gov or deliver one hard copy within 14 days after the date you receive this letter. Responses should be delivered to the EPW Committee at 410 Dirksen Senate Office Building, Washington, DC 20510. Due to security restrictions, only couriers or employees with government identification will be permitted to bring packages into the building.

If you have any questions about the requests or the hearing, please feel free to contact Susan Bodine Chief Counsel on the Committee's Majority staff at (202) 224-2829, or Jason Albritton Senior Policy Advisor Minority staff at (202) 224-1914.

Sincerely,

Barbara Boxer
Ranking Member

James M. Inhofe
Chairman

Questions for the Record
Senate Environment and Public Works Committee Hearing:
"Oversight Hearing: The President's FY 2016 Budget Request for the Environmental Protection Agency." On March 4, 2015
EPA Administrator Gina McCarthy

Chairman Sen. Inhofe:

Ozone:

1. In the proposed rule, you state that EPA will take a series of actions in the next year to implement the new standard. (EPA says it will issue guidance for state designations within 4 months of finalizing the rule, provide guidance for infrastructure SIPs, and propose any needed implementation rules within 1 year.)
   - Approximately how much money, resources, and staff will be required to complete this work in FY 2016?
   - Has EPA requested the resources needed to complete all of this work?
   - Where in the budget are these resources requested?

2. The proposal relies heavily on "unknown technologies" for compliance (Table 4-10 in the draft RIA: 66% of NOx controls in the East are unknown and 70% in the West are unknown). However, only "extreme" nonattainment areas can include unknowns in their SIPs.
   - How do you expect states to comply with a standard when your agency can't even identify ways to make it feasible?
   - Do you expect states to have to choose between extreme sanctions or self-designating themselves as "extreme" nonattainment areas, accepting all the extreme stationary source requirements that go along with that designation?
   - Your RIA already assumes in the "known controls" that the existing source proposal will be complied with fully, so how is it even remotely possible to achieve your proposed standard?

3. How much of future attainment relies on "unknown controls"? How does EPA calculate the cost these future "unknown controls"? Why has EPA lowered the cost of those unknown controls by half since developing the 2011 ozone rule?

4. In 2011, President Obama pulled the plug on this same proposal due to "regulatory burdens and regulatory uncertainty." Our economy was still struggling to recover from the recession, and the $90 billion price tag was something even he was unable to justify.
   - Do you really think that our economy is in better shape now to handle a $3 trillion rule than it was in 2011?
   - What has changed since the President's decision that signals now is an appropriate time to radically revise the standard before the benefits of the last one have been fully implemented?

5. Compared to just four years ago, EPA has lowered cost estimates for the same stringent ozone standards by as much as $51 billion. Have compliance costs for ozone controls really dropped by over 80% since 2010?

6. Over the last four years, EPA has slashed its cost estimates for the same stringent ozone standards.

    - Has the cost of compliance technologies gone down, or did EPA change the assumptions in its cost-benefit analysis?
    - How much of that reduction is due to projected air quality improvements versus changes in EPA's control cost assumptions?

7. In 2010, EPA projected that the same ozone standards that EPA is now proposing could cost as much as $44 billion per year. These are straight-up, added costs to American manufacturing. I'm concerned that, during this slow economic recovery, we are driving manufacturing out of the U.S., to other countries with lax environmental standards. In analyzing these proposed regulations, does EPA consider the effects of driving manufacturing offshore, to countries with little or no environmental controls?

8. High levels of natural background ozone may cause many otherwise clean states, especially in the West, to be unable to meet EPA's stringent ozone proposal even with costly emission controls.

    - EPA says it can deal with these concerns through its "exceptional events" program. Yet, since 2008, Utah has submitted 12 exception event demonstrations, and EPA has yet to approve one. Historically, how many times has the exceptional exceedance policy been used by the states and EPA? How long and what was the cost to taxpayers each time it was used? How many times annually do you expect it to be needed going forward?

    - EPA also says it can deal with these concerns through "Rural Transport Areas." Yet EPA has no track record for Rural Transport Areas under an 8 hour ozone standard like in the proposal. Why should we think the Agency can use Rural Transport Areas to provide regulatory relief to states with high background ozone?

9. Yellowstone national park's current ozone level is 66ppb—

    - Is the Agency considering setting a standard that is below the current ozone levels at Yellowstone National Park?

- I understand EPA has been criticized regarding the way background ozone concentrations are calculated and used. What steps is the agency taking to improve that process?

10. I understand that EPA does not exclude Mexican and Canadian ozone emissions when it determines background levels of ozone. What could a county in my district due to control emissions in a foreign country?

11. High levels of ozone transported from Asia and Mexico may mean that many otherwise clean states, especially in the West, will be unable to meet EPA's stringent ozone proposal even with costly emission controls. EPA says it can deal with these concerns through Clean Air Act provisions on international transport.

    - EPA has been notoriously slow in providing states similar regulatory relief for natural ozone under the Exceptional Events Program. Why should states believe that EPA will be any better in approving regulatory relief for international ozone transport?
    - Will EPA commit to not designate as nonattainment any counties that fail the proposal's ozone standards because of international transport?

12. EPA halted implementation of the 2008 ozone standard from 2010-2012 while it reconsidered that standard. That delay put state implementation of the 2008 ozone standard well behind the normal schedule. States are now committing time and money to catch up on the 2008 ozone standard. In fact, EPA just issued the implementation rules for the 2008 standard on February 13, 2015. Why is EPA proposing new ozone standards when it hasn't given states a chance to implement the current ones?

13. EPA chose to project the costs of its proposed ozone standard to 2025, eight years after counties will be designated as nonattainment areas under the proposal.
    - What consequences will those counties face while designated nonattainment?
    - Does EPA's modeling capture the cost of lost economic activity that counties in nonattainment areas will experience during those eight years?

14. EPA chose to project the costs of its proposed ozone standard to 2025, saying that would be the year in which most counties would have to attain the standards if granted compliance extensions.
    - Since EPA bases its entire economic analysis on these assumed extensions, will the Agency commit to extending compliance deadlines to the maximum extent possible when finalizing the ozone standards?
    - If EPA assumed longer compliance deadlines, shouldn't it write those compliance extensions into the final rule?

15. EPA reassures that counties won't be designated as nonattainment areas under its proposed stringent ozone standards for another three years. But won't those new

standards be immediately effective on PSD permits, making it harder for business to build and expand facilities to create new jobs?

16. EPA has said that most counties won't need to attain its stringent ozone standards until 2025. But counties in nonattainment areas will face severe regulatory consequences in just three years, and the new standards become immediately effective for permits to expand business. EPA seems to want us to think these proposed standards are a "next decade" problem, but aren't they a now problem?

17. EPA can't even point to controls capable of almost half the emissions reductions needed in the east – and all of the reductions required in California – to meet its stringent proposed ozone standard. This sounds like shoot first, ask questions later rulemaking. Should we be imposing this much burden on the American people when EPA doesn't even know how this rule can be accomplished?

18. EPA's modeling for its proposed stringent ozone standards caps costs for emissions reductions required from so-called "unknown controls" based on costs of known controls. This defies the basic economics of increasing marginal costs. Does EPA really believe that the costs of reaching the highest low-hanging fruit are the same as those to get the fruit at the top of the tree?

19. We hear a lot about the need to repair "crumbling roads and bridges." However, stringent ozone standards could make it harder for states to show that proposed highway project "conform" with ozone standards. Has EPA considered the economic and safety impacts that could result if these stringent ozone standards block crucial transportation projects?

20. According to EPA, ozone-forming emissions have been cut in half in the last three decades. This progress will continue under current regulations. Wouldn't you agree that Americans are already enjoying the benefits of cleaner air, and will enjoy even more future benefits, regardless whether the existing standards are adjusted?

21. EPA's modeling indicates that its proposed ozone standards may actually increase mortality in cities like Houston. Can you please explain how this proposal could end up increasing deaths in some areas?

22. Ozone is mainly outdoors. Yet most people spend 90% of their time indoors. Do you think this is why recent published studies found that indoor air quality and poverty were much more strongly linked to asthma than outdoor air quality?

23. Only 1 of the 12 studies considered by EPA show any link between long-term ozone exposure and mortality. And this study did not find any link in California, where ozone

levels are the highest in the country. Shouldn't we be concerned that EPA is cherry-picking science to support its regulatory agenda?

24. I'm concerned that EPA is cherry-picking and contorting science to support its ozone proposal. For instance, one study found no statistically significant difference in lung function in humans exposed to ozone at levels above and below the standards in EPA's ozone proposal. Yet EPA "reanalyzed" that data and decided there was a statistically significant impact after all – leading that study's author to say that EPA "misinterpreted" his data. Shouldn't EPA just go where the science points, rather than trying to shoehorn findings into its regulatory agenda?

25. All of the clinical studies cited by CASAC in support of the 60 ppb standard were created by the EPA. Yet, all of the non-EPA literature on health impacts of 60 ppb ozone cited by CASAC does not support a 60 ppb standard. Is this what EPA meant when it said that "increasing uncertainty in the scientific evidence at lower ozone concentrations" led it to not include a 60 ppb standard in the ozone proposal?

26. EPA has released maps showing only the projected counties in non-attainment in 2025.

    - Under EPA guidance does the agency designate non-attainment area boundaries starts with metropolitan area as the "presumptive" nonattainment area? Why are your maps inconsistent with your guidance?

27. How many counties still do not meet the 1997 ozone standards? How about the 2008 standards? Doesn't it make sense to work on attaining the existing standards, the tightest standards ever, before promulgating new standards?

28. Why does EPA leave California off of its maps and analyses? If California is being give a longer period of time to attain the standards, shouldn't other places in the country be granted that latitude as well? How much ($/ton) are NOx offset reductions selling for in Houston? Los Angeles? Other places?

Climate:

1. The budget request includes a $4 Billion incentive program for states that reduce CO2 emissions beyond the existing source proposal.
    - How do you propose to implement this program?
    - Do you plan to send Congress a legislative proposal?
    - If the proposal is to give states money if they go beyond EPA mandates, will the result be to transfer taxpayer dollars away from states with large emission reduction burdens under your plan to states that have a smaller burden. For example, Vermont has no emissions reduction obligation under your plan because

its power plants are small. So, would you automatically transfer taxpayer money from Southeastern and Southwestern states to Vermont?

2. With respect to the Clean Power Plan, your justification statement says: "In FY 2016, the EPA will encounter a staggering workload to implement these rules and agency resources have been shifted to help meet the demand. Because of the breadth, complexity and precedent-setting nature of work, the agency expects a marked increase in demands for legal counsel in both headquarters and Regional Offices. In addition, each EPA action is expected to be challenged in court, which will require skilled and experienced attorneys specialized in the Clean Air Act to devote significant resources to defense of these actions."
    - In your own budget justification statement you say that these rules will result in a "staggering workload" to implement and defend these two rules. Don't you think those taxpayer dollars would be better spent increasing funding to states to implement existing programs rather than spending it on lawyers?

3. Recent correspondence between your agency and the House Energy and Commerce Committee indicated EPA has not "explicitly modeled the temperature impacts of the Clean Power Plan" and could not state what, if any impact the rule would have on global temperatures or sea rise levels.
    - Why hasn't EPA done the modeling? Is it a matter of budgeting?
    - Why is your agency attempting to impose this extremely complex rule and spend billions of taxpayer dollars to address global warming when you haven't even checked to see if the rule would actually achieve your global warming goals?

4. Your budget would eliminate funding under the Indoor Radon Abatement Act which authorizes grants to states to address radon (-$8 million) even though indoor radon is the second-leading cause of lung cancer and the leading cause of lung cancer for non-smokers and the funding was targeted this funding to support states with the greatest populations at highest risk. According to your Budget in Brief, indoor radon causes an estimated 21,000 lung cancer deaths annually in the U.S. Carbon dioxide causes no deaths.
    - Why would the budget propose spending $279 million to rework the U.S. energy economy (climate regulations) while ignoring real environmental threats?

5. Section 110(c) of the Clean Air Act requires EPA to issue a Federal implementation Plan (FIP) if a state does not submit a State Implementation Plan (SIP), does not submit a satisfactory SIP or does not make a satisfactory SIP revision (42 U.S.C. 7410(c)). Please provide a list of enforcement mechanisms with cites to the relative legal authority the EPA will use to enforce all components of a federal plan on a state that does not does not submit a SIP, does not submit a satisfactory SIP - in whole or in part - or fails to make a satisfactory revision that meets the criteria of the proposed Clean Power Plan.

6. During the hearing, I asked you if the EPA would consider withholding federal highway funding if a state that does not submit a SIP, does not submit a satisfactory SIP - in whole or in part - or fails to make a satisfactory revision that meets the criteria of the proposed Clean Power Plan. You responded,

> "Ms. McCarthy. This is not a traditional State SIP under the national ambient air quality standards. There are other processes for us to work with States. Clearly our hope is that States will provide the necessary plans. If not, there will be a federal system in place to allow us to move forward."

Will you clarify for the record whether EPA would consider withholding federal highway funding to enforce any elements of the proposed Clean Power Plan?

Waters of the United States

1. Please provide me with examples where EPA or the Corps has used a groundwater connection to establish jurisdiction over a body of water that has no surface connection, direct or indirect, to a navigable water. For any such examples, please also provide the distance between the body of water that lacks such a surface connection and the nearest water of the United States. Please exclude any allegations that a groundwater connection establishes the existence of a point source discharge where the body of water with no surface connection was itself determined to be a point source, rather than a water of the United States.

2. Is it currently the national policy of either EPA or the Corps of Engineers to establish jurisdiction over all wetlands in flood plain?

3. Is it currently the national policy of either EPA or the Corps of Engineers to establish jurisdiction over all waters in flood plain?

Hydraulic Fracturing

1. The EPA continues its study into the relationship between drinking water and hydraulic fracturing, which was initiated in 2010. Well over $20 million has been spent on this study and the timeline continues to slip. In fact, the draft assessment report was expected in December 2014 yet today, there is no indication when this will be released.
   What is the current timeline for release of the EPA's drinking water study?
   Will the report undergo interagency review prior to its release? If so, which agencies will be a part of the review? If not, why not?
   After the draft assessment report is released, what is the timeline moving forward?

2. You've said that hydraulic fracturing can be done safely and have agreed with former EPA Administrator Lisa Jackson that there have been no confirmed cases of hydraulic

fracturing impacting drinking water. The White House Council on Economic Advisors released a report last week that touted the economic benefits because of the increase in domestic oil and natural gas and clearly linked the production increases to the use of hydraulic fracturing and horizontal drilling. What is your vision for getting the American public to understand that hydraulic fracturing is safe and that fracking has unlocked an American energy revolution that has lowered all Americans's energy prices, created jobs, helping lower GHG emissions and revitalizing such industries as the manufacturing, steel and chemical sectors?

3. In the draft FY 2016 budget proposal, it states that EPA will respond to peer review comments from the Agency's Science Advisory Board (SAB) in order to finalize the study. It further suggests that the report will provide a synthesis of the state of the science, including the results of research focused on whether hydraulic fracturing affects drinking water resources, and if so, will identify the driving factors.

   - Clearly you already have a plan for additional research. Can you share those plans?

   - More importantly, will the Agency actually consider the recommendations of its own Science Advisory Board in this process, particularly if those recommendations do not align with EPA's own research initiatives, which you just addressed?

4. Director McCarthy, the President's new economic report says that 1) "natural gas is already playing a central role in the transition to a clean energy future," 2) that an effective regulatory structure for addressing environmental concerns already "exists primarily at the State and local level," and 3) that unconventional natural gas production technology unleashed in the U.S. "can help the rest of the world reduce its dependence on high-carbon fuels." Given this positive view from the White House, which is supported by a broad scientific consensus, how do you intend to ensure that your agency's proposed regulations on methane will not short-circuit the U.S. energy revolution that is driving so much job creation?
   - Can we assume that the upcoming EPA study on hydraulic fracturing will not conflict with this latest White House report that recognizes the clear advantages of unconventional energy development?

5. In February 2014 the EPA's IG sent a memo to the EPA Office of Water outlining an initiative the IG has underway that will "determine and evaluate what regulatory authority is available to the EPA and states, identify potential threats to water resources from hydraulic fracturing, and evaluate the EPA's and states' responses to them." Do you consider this a duplication of the EPA's efforts as it relates to the multi-year and multi-million dollar hydraulic fracturing and water study currently in process at the EPA

and if not, then how do these studies differ? Hasn't EPA independently done this type of evaluation (see the letter from EPA to NRDC)?

SRF Program:

1. It is my understanding that since the program's inception in 1988, the Clean Water State Revolving Loan Funds have provided a total of $105 billion in assistance, leveraging federal capitalization grants totaling approximately $36.2 billion. Further, since the program's inception in 1997, Drinking Water State Revolving Loan Funds have provided approximately $33 billion in assistance, leveraging federal capitalization grants totaling approximately $19 billion. This means that for every federal dollar invested in the Clean Water SFR community wastewater systems have received nearly $3 dollars in assistance and for every dollar in the Drinking Water SRF community water systems have received approximately $1.75 dollars in assistance.
    - Do you agree that the SRF program has been among the most successful programs we have in government?
    - It that is so, why does the President's budget perennially underfund these programs?

2. Under the Clean Water Act, EPA is supposed to send a report to Congress on the funding needs for both wastewater and drinking water infrastructure. The last report to Congress on wastewater needs was based on the 2008 Clean Water Needs Survey. The estimate of need in that survey -- $298 billion over 20 years – is woefully out of date. That estimate is based on cities' own capital improvement plans. It does not reflect new mandates like the hugely costly sewer overflow control measures that EPA is imposing on cities in enforcement actions or costly new requirements for nutrient reductions and stormwater controls.

    By failing to provide an updated estimate of needs, EPA is doing a disservice to Congress, to cities, and to itself. We all need reliable information to make good decisions and EPA is required by law to update the needs survey every 4 years.

    - When will EPA provide Congress with the updated the Clean Water Needs Survey?

3. We all know that the needs for both water and wastewater are huge.
According to the U.S. Conference of Mayors, cities are spending $115 billion a year to provide water and wastewater services and meet federal mandates. So, the proposal to provide a combined $2.3 billion for the Clean Water and Drinking Water State Revolving Funds is a drop in the bucket. Since the federal government does not provide funding to meet those mandates, I think it is important to take a hard look at how we are asking cities to spend their citizen's money.

- We all support clean and safe water. But, I am told that EPA enforcement officials extract penalties on top of commitments of hundreds of millions of dollars to address sewer overflows. Is that right?
- I also am told that EPA enforcement officials will require complete elimination over sewer overflows if they think a city can pay for it, when a less expensive approach could meet water quality standards. Is that right? Is EPA requiring cities to do more than meet the standards that states have set and EPA has approved that will protect water quality?

4. Given the enormous cost of meeting water and wastewater mandates, affordability is a significant issue. It is my understanding that at EPA Headquarters, you talk about giving cities more time to meet mandates; you talk about adaptive management; and you talk about using green infrastructure alternatives. However, when they bring enforcement actions against cities, EPA regions and Headquarters enforcement officials are not providing these flexibilities.
   - How are you addressing the real affordability concerns of cities?
   - Do you think your enforcement officials should try to extract every last dollar from a city that you claim they can afford even if spending more money will not provide additional water quality benefits?
   - If a city steps up and agrees to spend hundreds of millions or in some cases billions of dollars, do you think it is also appropriate to impose penalties on that city when the penalty will simply go to the U.S. Treasury and will reduce the amount of funding available to help improve the environment?

5. I am very concerned that the way EPA looks at affordability when they decide what mandates to impose on communities means that our poorest citizens will end up paying 10% or more of their income on sewer bills.

   Last Congress, in Title V of the Water Resources Reform and Development Act, we amended the Clean Water Act to give direction on how to identify what communities would experience a significant hardship raising the revenue to finance projects to meet Clean Water Act mandates. One of the criteria that we listed in the statute is whether the area is considered economically distressed under the Public Works and Economic Development Act. Under this Act, a community or area within a larger political boundary is economically distressed when --
      - the per capita income at 80% or less than national average,
      - unemployment is 1% or more greater than national average, or
      - there is an actual or threatened severe unemployment or economic adjustment.

   This information is provided by the community and must be accepted unless the Secretary of Commerce determines it is inaccurate.
      - Will EPA also incorporate this approach into your evaluation of affordability when taking enforcement action?

Technical Assistance to States

1. In EPA's FY2016 Budget Request, the Agency did not request any funds for the EPA technical assistance competitive grant program. As you know, this program provides small and rural communities with the training and technical assistance necessary to improve water quality and provide safe drinking water. Many communities count on this program to assist them in complying with federal regulations when operating drinking and wastewater treatment facilities. These communities believe that is the most effective program to aid in compliance with the requirements of both the Clean Water Act and the Safe Drinking Water Act. In the past Congress has agreed and from FY2013 - FY2015 appropriated $12.7 million for the program. Given its success and importance to so many communities across the country, why is EPA is not requesting any funds to support this grant program in FY 2016?

2. You have requested $46 million and 13 new FTES for an unauthorized program to improve climate resilience for water and wastewater facilities. In contrast, you have requested only $5 million for FY 2016 out of the EPM account to set up the implementing the newly authorized Water Infrastructure Finance and Innovation Authority (WIFIA), but no money out of the STAG account to actually implement it. How can you explain the disparities in these requests? What does this say about your priorities?

New Definition of Flood Plain

On January 30, 2015, the President signed a new Executive Order (EO 13690) that changed the existing flood plain management policy that has been in effect since 1977. With these changes, the policy applies to all agencies and all federal actions and flood plain is now defined as either the 500 year flood plain or a larger area based on climate modeling.

- Will this new definition affect the projects that states can fund using the State Revolving Loan Funds?
- Will this new definition affect the type, size, or location of infrastructure that EPA requires cities to build to treat wastewater or to address sewer overflows under enforcement agreements?
- Will this new definition affect the conditions attached to municipal stormwater permits?
- What was EPA's involvement in developing this Executive Order?
- What outreach efforts were made before signing this Executive Order to state and local governments?

Stormwater

EPA has announced that it has abandoned its plans to develop a national storm water rule making that would have tried to expand your authority to regulate not only pollutants, but also the actual flow of water. That is not surprising given the fact that courts have made it clear that the Clean Water Act does not give EPA any authority to regulate water flows. However, it is my understanding that your agency is continuing to advance this agenda by regulating water flows in individual permits.

- Will you commit to me that your agency will use Clean Water Act permits to regulate the discharge of pollutants only and not the flow of water?

Attorneys/Workforce

1. Administrator McCarthy, the President's budget request seeks an additional $10 million that would go to hire almost 40 additional attorneys to work at EPA. More than $3.5 million would go to hire 20 new attorneys who would be devoted to supporting the Clean Power Plan alone.

   At a House committee hearing last week, you stated that these attorneys would not be "litigation attorneys" and instead would be used to help with reviewing permits and assisting states to set up their programs.

   However, your own budget justification says these additional attorneys and needed because, "In addition, each EPA action is expected to be challenged in court, which will require skilled and experienced attorneys specialized in the Clean Air Act to devote significant resources to defense of these action."

   - Which is it? Do you stand behind your recent statement to Congress, meaning the budget justification is incorrect? Or do you agree that you need to hire additional attorneys in part to defend these unlawful rules in court?

2. The Budget justification goes on to say that additional legal resources will make EPA more responsive to states, industry, and citizens, and will make EPA's actions more defensible in court. Yet the budget request also says there are no performance measures for the agency's attorneys like there are for other programs.

   - Why is that?
   - Does this lack of staffing or accountability explain why, when it issued performance standards for new sources in September 2013, EPA seemed unaware of the Energy Power Act provision that prohibits the use of carbon capture projects receiving certain federal funding from being used to show the technology had been adequately demonstrated?
   - Shouldn't EPA attorneys and staff in the Air office have known about that provision before the rule was proposed?
   - How are you going to ensure that these additional legal resources will be used effectively?
   - Would these be term-limited positions, or permanent hires?
   - Do the agency's attorneys – or any employees for that matter – keep track of their time, like attorneys in the private sector do or workers at a coal mine or factory would?
   - Given the issues EPA has had with time and attendance problems, what is EPA doing to ensure that EPA staff are in fact doing the jobs they are being paid to do?

3. Please describe the process and resources the Agency (both Headquarters and Regional Offices) currently uses to track litigation to which it is a party, as well as deadlines for

regulatory or other EPA action that have been established in litigation settlements or court orders. What efforts are planned in FY 2016 to improve this process and the public transparency of this tracking? What public notice and opportunity for comment and public participation does the Agency give to the public when a deadline established in a settlement or court order is revised or extended?

4. For its FY2015 budget proposal, EPA requested to remove the 50 person ceiling for hiring under Title 42. A March 5, 2015, EPA Inspector General report found that EPA's Office of Research and Development did not always demonstrate the need to use Title 42 to recruit or retain 19 positions reviewed. In four cases reviewed, the IG found that employees were converted to Title 42 to perform the same position, yet paid a total $47,264 more in salary for performing the same job. The EPA OIG recommended that EPA improve transparency and its justification for the use of Title 42 appointments or reappointments, which could result in potential monetary benefits of $3.5 million. EPA did not agree with the OIG's recommendation. The OIG responded that EPA's alternate approach does not address the need to justify the need to use Title 42 authority or the need for more transparency in the decisions to use the Title 42 authority.

    - Why did EPA request to remove the 50 person ceiling under Title 42 for FY2015 and not for FY2016?
    - Why did EPA disagree with the OIG's recommendations?
    - How will the EPA address the need for greater transparency and justification for Title 42 hiring?

Homeland Security

1. Administrator McCarthy, President Obama recently said that terrorism is less of a threat to the American people than climate change. Do you agree?

2. Does the President's thinking explain why EPA's budget request has cut homeland security related funding in several important areas?

For example, the budget would cut more than $1 million from the Science and Technology account for work to treat contamination from chemical and radiological incidents (Page 131). The budget would also cut more than $2.5 million from the Superfund account reducing EPA's ability to detect threats and test and decontaminate sites.

- Why is EPA cutting back its capability to detect and respond to biological or radiological attacks?

3. The budget for emergency preparedness is essentially stagnant (only a slight $200,000 increase due to higher fixed cost for rent and staff salaries).

    - What does this mean in practice – fewer air monitoring flights, slower response times, increased risks to human health and the environment from a terrorist event?

4. Recent scandals suggest that EPA has a "culture of complacency" among some supervisors and managers when it comes to time and attendance problems, computer usage, and property management.

   - Given these concerns – and ongoing work by the Office of Inspector General – I am troubled to see the low priority that EPA places on screening job applicants and making sure its employees have been vetted and are suitable for their positions of trust.
   - For example, the homeland security budget for conducting background checks for employees and contractors would be cut by $340,000 – even though the John Beale episode has highlighted the need for improved background checks. Do you think this is the time for EPA to be cutting back on its process for doing background checks?

5. The IG has also raised concerns about the Office of Homeland Security and its interference with the IG's law enforcement work. How will this be resolved so it does not become a distraction to the Agency and impede EPA's homeland security mission?

GAO Reports

1. The Government Accountability Office issued a report last year on problems with how EPA analyzes its regulations for economic impact, less burdensome alternatives, and uncertainties. GAO found that EPA's regulatory impact analysis (RIAs) do not clearly identify the costs of EPA's rules and the data EPA used in its analyses were often out of date and irrelevant.

For example, GAO found that for several high-profile clean air and water rules, EPA relied on employment data that was between 20 and 30 years old and from only four industrial sectors. The GAO report states, "Without additional information and improvements in its approach for estimating employment effects, EPA's RIAs may be limited in their usefulness for helping decision makers and the public understand the potential effects of the agency's regulations on employment."

That's a big problem – that EPA is making these incredibly significant regulatory decisions – and the American public, Congress, and even EPA itself do not know what the economic impacts or potential job losses will be.

- Is EPA continuing to rely on the outdated and limited employment data when analyzing the potential job impacts of its rules? If not, what is EPA relying on?
- How much of EPA's budget request will be going toward improving and updating the employment data that EPA uses in its economic analysis documents?

2. The GAO report also found that EPA had cut corners in its economic analysis due to the short time frames it had for issuing rules pursuant to court-ordered deadlines and litigation settlements.
   - What criteria does EPA use when agreeing to a rulemaking deadline in a litigation settlement?

- How does EPA's obligation to conduct a robust analysis of a rule's economic impact factor into these court-ordered deadlines, or does it get short shrift in the discussions?
- Is part of the problem that laws like the Clean Air Act have unreasonable deadlines?
- Would you support attempts to give EPA additional time under the law to issue rules or update standards every 5 or 8 years as currently may be the case?

Facilities

Administrator McCarthy, EPA's budget justification says EPA is continuing to recalculate its facility and rent needs. It says that EPA plans to spend $1 million from the Science and Technology account to study further consolidation (Page 140) and that EPA intends to save $9.5 million from the EPM account from these efforts (Page 427).

- What plans if any does EPA have to close or relocate program, regional or lab offices or spaces across the country in FY 2016? When will affected offices be informed of their closure? Will the affected employees be given the opportunity to relocate or transfer to another duty station?
- How much has EPA spent in FY 2014 and 2015 to relocate employees? How much does it expect to spend on relocation expenses in FY 2016?

Superfund/Hazardous Waste

1. The FY 2016 budget shifts EPA's emphasis from well-established programs approved by Congress to ones that advance the President's Climate Action Plan.
    - For example, the budget would cut almost $1 million and 5 FTEs from its RCRA corrective action program, which will reduce "EPA's technical support to state partners and may reduce the pace of cleanups including site-wide 'RCRA remedy construction' determinations." How will this reduction impact EPA's implementation of recommendations in the Government Accountability Office's 2011 report concerning RCRA corrective actions?
    - How will EPA prioritize its work and support to states in response to the proposed reductions in funding?
    - Will any sites or states that would have received support in order for EPA to meet its corrective action goals in the FY 2014-2018 Strategic Plan, no longer receive support due to the proposed reductions in funding?
    - In another example, the FY 2016 budget request would cut funding for the RCRA waste management program by $1.3 million and more than 9 FTEs, which according to EPA's budget justification "may delay activities such as conducting additional analysis to support non-hazardous secondary materials categorical rulemakings and responding to regulatory backlog petitions." Please identify how many "regulatory backlog petitions" EPA had at the start of FY 2015 and the backlog time for each petition.

- How will this proposed reduction impact EPA's implementation of the final Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities rule, signed by EPA on December 19, 2014?

2. Notably, the FY 2016 budget proposed a $2.3 million increase, including an additional 4.2 FTEs, for the Sustainable Materials Management program to implement key aspects of the President's Climate Action Plan.
    - The budget justification states EPA will explore the application of Sustainable Materials Management "approach to other high priority areas." What are these areas?
    - The budget justification also states that EPA plans to hire 5 FTEs to serve as "Community Resource Coordinators for climate adaptation, sustainability, and communities work" who will "work as a cross-agency, multi-media team to facilitate access to EPA's programs and resources." Please explain whether these would be permanent or term-limited positions, the professional qualifiations for these positions, and from what Headquarters or regional office such positions would be based.
    - The budget request proposes the creation of a $1.3 million grant program "to support the EPA's investment in climate mitigation through waste program activities to reduce greenhouse gas emissions." Please describe the statutory authority for this program, the anticipated number of grants that would be funded in FY 2016, and a summary of the criteria EPA would use for grant awards.

3. Concerns remain about the slow pace of Superfund cleanups. In FY 2014, EPA achieved construction completions at only 8 Superfund sites, an all-time low, with an enacted budget for Superfund cleanups at $555 million. In FY 2016, EPA is proposing to achieve construction completions at 13 sites with a budget request of $539 million. How many additional Superfund sites would EPA be able to clean up if the $214 million that the President has requested for greenhouse gas rules were put toward the Superfund program instead?

Keystone

1. Administrator McCarthy, in January of this year you stated that EPA believes current low oil prices are a short-term situation and will not affect how your Agency crafts new regulations.

- Do you still stand by that statement?
- Can you please explain to me why 3 weeks later EPA told the State Department that it should revisit its analysis of the Keystone XL pipeline with a new assumption that the current low oil prices are permanent?

- As a general rule, you ignore short-term oil prices when evaluating costs and benefits. But, politics appear to determine when you make an exception to that rule. How can you reconcile this inconsistency?

Methane

1. Administrator McCarthy, the Administration has acknowledged the great benefits that we are now enjoying as a result of the natural-gas renaissance in the US. In fact, the US is now the world's largest gas producer. As this was occurring, our nation's producers have been making great strides in reducing methane emissions thanks to investments in technology allowing us to produce more natural gas in a cleaner way. In fact, today, while natural gas production has increased 37% since 1990, methane from production has gone down by 25%. I am concerned as such by your January announcement regarding methane regulation.
   - Why are you targeting such a steep 45% reduction in emissions from an industry that has already reduced its emissions significantly while increasing production? Moreover, the production sector represents only *0.4 - 1.4 percent* of U.S. GHG emissions.

2. In the Administration's January 14th release to reduce methane emissions from this industry, an assumption was given projecting that industry's methane emissions will be increasing by 25% - not decreasing as already shown.

   - Can you explain this assumption and provide the specific data from which you've based these projections?

3. Administrator McCarthy, I'm trying to understand EPA's rationale for pursuing another round of Clean Air Act regulations on natural gas production. This time the agency is directly targeting methane. I think it's important to note the industry's progress in reducing methane. Natural gas producers have reduced methane emissions by 25 percent since 1990, even as production has grown 37 percent.

   A recent report by researchers at the University of Texas and the Environmental Defense Fund (EDF) found that methane emissions from the upstream portion of the supply chain are only 0.38 percent of production. That's about 10 percent lower than what the same research team found in a study released in September 2013. Studies by the National Renewable Energy Laboratory, U.N. IPCC, Massachusetts Institute of Technology, and many others reached similar conclusion: that methane emissions from natural gas production are declining, and quite low compared to other sources.

   Moreover, we can't forget that methane is the main component of natural gas. Producers have every incentive to capture it and prevent leaks. The evidence I just cited shows this is exactly what they are doing.

   The industry is only now implementing new source performance and MACT standards finalized in 2012, which target VOCs and sulfur dioxide, but also will help reduce

methane. So Administrator, my question is: Why is EPA pursuing another round of mandates on the industry? What is the rationale for moving down this path?

4. Administrator, EPA indicated it will develop new source performance standards for new and modified natural gas wells this summer. This action will be taken pursuant to Section 111(b) of the Clean Air Act, which covers new and modified sources. Some legal commentators believe that this action will provide the basis for regulations of existing wells under Section 111(d). What is EPA's legal view on this point? Once you finalize regulations under 111(b), are regulations for existing wells inevitable under 111(d)? Is EPA planning or thinking about regulation existing wells under 111(d)?

Environmental Education

For its FY2015 budget proposal, EPA requested zero funds for its environmental education program; yet its FY2016 budget proposal requests funds—albeit an increase in funds from $8.7 million enacted in FY2015 to $10.969 million.

- Why did EPA, after requesting zero funds for the program over the last couple years, request funds and an increase in funding for the program?
- EPA has recently identified climate change as a priority for environmental education grants under this program. These grants are used to educate elementary and secondary school students, train teachers, purchase textbooks, and develop curricula based on environmental issues EPA identifies as a priority. What performance measures are in place to ensure such curricula is based on the best available science?

Uranium and Thorium Mill Tailings

1. In January, the U.S. Environmental Protection Agency proposed "Health and Environmental Standards for Uranium and Thorium Mill Tailings (80 Fed. Reg. 4156). The agency maintains the rulemaking is necessary to reduce the risk of undetected excursions of pollutants from in situ uranium recovery operations into adjacent aquifers.

   - Does the agency have any evidence that these operations have adversely impacted an adjacent aquifer? If so, please provide such data.
   - Please explain why no such data is included in the rulemaking docket.
   - If EPA has no such data, please explain the basis for proceeding with this rulemaking.

2. In the cost benefit analysis accompanying the rulemaking, the agency focuses almost exclusively on the increased costs that would be imposed by the proposed rule's new monitoring requirements, which could require facilities to conduct more than 30 additional years of groundwater monitoring. EPA fails to assess multiple other costs that would be associated with the rule, including the costs of maintaining licenses, permits, etc. for 30 years; claims maintenance fees owed to the Bureau of Land Management for facilities on public lands; costs to obtain and maintain surety for additional years; costs

related to continuing leases with private surface holders; taxes; insurance; or the cost of maintaining equipment and facilities. Given the additional costs that would be imposed, it is likely that the ultimate cost would be several orders of magnitude higher than EPA calculated in their cost benefit analysis.

- Please explain why EPA chose to ignore these costs in its analysis.
- Does EPA plan to revise its cost benefit analysis to more comprehensively assess the costs of the rulemaking? If not, why not?

Sen. Booker:

1) The BEACH Act authorized the EPA to award grants to eligible states, territories, and tribes to develop and implement beach water quality monitoring and notification programs for coastal recreational waters. As a result, EPA's Beach Grants have made nearly $10 million a year available for the past four years. The program allows for a more standardized approach to the monitoring of water quality and the notification of beachgoers if the water they are swimming in is unsafe for recreation.
    a. What is EPA's justification for zeroing out funding for the BEACH Act grant program?
    b. Given the reduction in EPA's proposed FY16 from $10 million to $0, how does EPA plan to assist state and local public health officials in identifying, notifying the public of, and ultimately reducing the risk of illness and disease to swimmers at our recreational beaches?

Senator Fischer:

National Environmental Policy Act (NEPA) Greenhouse Gas (GHG) Guidance

1) In your budget justification document you say:
"In support of the President's Climate Action Plan, the EPA will work to assist other federal agencies to improve the analysis of climate change issues under NEPA, including estimating greenhouse gas emissions associated with federal actions and consideration of mitigation measures, as well as fostering climate resiliency." Are you already implementing CEQ's draft guidance that would require all federal agencies to address global climate change in NEPA reviews?

2) In your role as a reviewer of Environmental Impact Statements developed by other agencies, do you believe you can require other agencies to adopt measures to mitigate global climate change?

3) Do you think that the draft CEQ guidance would give you the power to second-guess a decision by another federal agency that any effect on global climate change is insignificant and no EIS is needed?

4) Have you done any outreach to stakeholders on the draft CEQ guidance?

5) How will the new guidance affect how EPA complies with NEPA for its own actions, such as issuing Clean Water Act permits or developing regulations?

Renewable Fuels Standard (RFS)

6) In 2007, Congress put the Renewable Fuel Standard in place for 15 years, setting a stable policy environment to drive investment and growth in renewable fuel. This approach has guided billions of dollars from around the world and here at home toward innovation inside the United States. American agriculture has also responded to this investment signal. For example, just this year, 3 cellulosic biofuel refineries opened, each co-located with a corn ethanol facility. Each biorefinery is producing clean, cellulosic biofuel. Using specially designed equipment, all three facilities use corn stover, an agricultural waste material collected from the very same fields that provide corn to ethanol facilities. This didn't happen by accident. Farmers make planting decisions based on the RFS. Equipment manufacturers' invest million in R&D perfecting new equipment that can be available to serve this market. Congress made a promise in 2007, and it is the EPA's responsibility to uphold that promise with a regulatory process that meets our intent. The 2014 RVO proposal would have stranded billions of dollars of investment and ripped the rug out from under those in the private sector who responded to the investment signals of the RFS. Will your new proposal retain the commitment to American agriculture that we made nearly a decade ago?

7) Your staff has recently stated that you anticipate putting out RFS volumes by late June. Do you see that as acceptable? Given that we have biodiesel producers across the country shutting down or idling their plants, why do we need to wait another four months? If we wait until June we've lost another half of a year.

8) Your staff also recently stated that 2014 numbers will be based on actual production. What does that mean exactly? Does that mean the volumes will be set at the levels that were actually produced under the RFS in 2014? And can we assume that we will see growth from there in the biodiesel category in 2015 and 2016?

9) You recently approved an application from Argentinian companies to essentially streamline biodiesel imports from Argentina under the RFS. Why would you do that when the overall RFS hasn't been set for two years and the U.S. industry is in disarray? It almost shows a disregard for the U.S. companies that we know are struggling as a direct result of the delays on the RFS. Can you explain why you would do that at this time? Why not wait until the RFS volumes are set and then make a decision on the Argentina imports?

10) I understand that in setting the annual biodiesel volumes you are required under the law to look at production capacity and other factors. So now that we know this extra production exists and is likely coming to the United States, how will you account for that as you set annual RFS standards for biodiesel? In other words, will you increase volumes

more aggressively to allow U.S. producers to continue to grow, so that they're not displaced by these Argentinian imports?

EPA Region 7

11) Private Nebraska building contractor entities have shared inquiries and questions regarding EPA Region 7, Kansas City, and the utilization of resources and personnel enforcing lead paint regulations against Nebraska home and building contractors. In particular, private building contractors have expressed concerns involving the manner and rationale of investigations conducted by Region 7 and the protocol for fines pursued for stated violations.

12) In order to address concerns expressed by Nebraska private contractor interests, I request that EPA provide the following information involving Region 7, Kansas City and the regulation of lead paint in private homes and commercial businesses:

13) Please provide a budget breakdown of:

The amount of Region 7 funds expended for outreach and education to the building contractor community in Nebraska.
The amount of funds directly tied to educating property owners and building contractors on EPA lead paint rules and regulations.

What amount of Region 7's Budget is dedicated to investigations and pursuit of fines?

14) Does Region 7 contract with private or commercial entities to investigate reported violations?

15) Does Region 7 offer financial incentives to individuals who

Sen. Wicker:

1) As I hope you know, a one-sided focus on worst-case stories and scenarios is a poor foundation for sound environmental and economic policies. There is an extraordinary amount of uncertainty in climate science mainly because of the complex nature of the climate and climate models. Climate model predictions have wildly varying degrees of accuracy and many have estimates that failed to come to fruition. With so much uncertainty and unknown variables regarding the impacts of carbon dioxide on the world's oceans and environment how can you possibly accurately estimate the costs and benefits of your proposals? Considering you can't provide a quantifiable, measurable direct impact of these regulations on sea level rise and global temperatures, don't you think the other supposed benefits to society are equally uncertain and overstated?

2) With each and every climate regulation put forward by the administration, the supposed benefits of each regulation continue to get smaller and and smaller and more imaginary

while the costs to American taxpayers and the economy continue to grow. A sound environmental and economic policy would place amount of regulation, in this case carbon dioxide emissions, where the marginal benefits are equal to the marginal costs. It seems the opposite is true in the latest EPA budget proposal. While carbon dioxide emissions continue to rise across the globe, at what point will EPA begin to allocate their limited budgetary resources to other programs that have greater benefits to American taxpayers while imposing lower costs on them?

3) In the FY16 budget request, EPA notes it will be finalizing rules for formaldehyde emissions in composite wood products. Why has EPA decided to regulate laminated products when the authorizing legislation gives you authority to exempt those products? The testing costs far exceed any benefit considering that studies submitted to EPA show that the value added process of finishing laminated products can reduce the emission profile of an already compliant platform.

4) With respect to the ongoing rulemaking on formaldehyde emissions in composite wood products, you recently stated that laminates could potentially be a "significant source of emissions." Does EPA have scientific data that validates that statement? Will you share it with the committee? Data submitted to the public record during the rulemaking shows that the value added process of finishing laminated products can reduce the emission profile of an already compliant platform.

5) The academic and scientific communities are actively pursuing research into the magnitude of methane emissions from various sectors of the U.S. economy. With much of this research outstanding, why doesn't EPA wait to understand the major sources of methane emissions before promulgating regulation?

6) EPA's announcement last month on methane regulation indicated that there was no intention to regulate existing sources in the oil and gas industry at this time, instead, the agency would allow for voluntary actions by industry for existing sources. Aren't the control technique guidelines, coupled with your pending ozone regulation essentially a defacto regulation of existing sources in the industry?

Questions Submitted for the Record by Chairman Senator Inhofe

OZONE

Question 1: In the proposed rule, you state that EPA will take a series of actions in the next year to implement the new standard. (EPA says it will issue guidance for state designations within 4 months of finalizing the rule, provide guidance for infrastructure SIPs, and propose any needed implementation rules within 1 year.)

- Approximately how much money, resources, and staff will be required to complete this work in FY 2016?
- Has EPA requested the resources needed to complete all of this work?
- Where in the budget are these resources requested?

Answer: Within the levels in the FY 2016 President's Budget, the agency requests the resources and FTE necessary to continue its Clean Air Act-prescribed responsibilities to administer and implement the NAAQS. This includes funding for review of the ozone NAAQS and for implementation of a potentially revised ozone standard, including development of transition guidance and area designation guidance, within current statutory and resource limitations. The agency also will continue consulting with states to determine additional methods to improve the SIP development and implementation process that are within current statutory limitations.

Question 2: The proposal relies heavily on "unknown technologies" for compliance (Table 4-10 in the draft RIA: 66% of NOx controls in the East are unknown and 70% in the West are unknown). However, only "extreme" nonattainment areas can include unknowns in their SIPs.

- How do you expect states to comply with a standard when your agency can't even identify ways to make it feasible?
- Do you expect states to have to choose between extreme sanctions or self-designating themselves as "extreme" nonattainment areas, accepting all the extreme stationary source requirements that go along with that designation?
- Your RIA already assumes in the "known controls" that the existing source proposal will be complied with fully, so how is it even remotely possible to achieve your proposed standard?

Answer: The EPA's application of unknown control measures reflects the agency's experience that some portion of controls to be applied in the future may not be currently available but will be deployed or developed over time. The EPA's application of unknown control measures does not mean the agency has concluded that all unknown control measures are currently not commercially available or do not exist. Unknown control technologies or measures can include existing controls or measures for which the EPA does not have sufficient data to accurately estimate engineering costs. In addition, there will likely be some emissions reductions from currently unknown control technologies as a result of state-specific rules that are not yet finalized.

Question 3: How much of future attainment relies on "unknown controls"? How does EPA calculate the cost these future "unknown controls"? Why has EPA lowered the cost of those unknown controls by half since developing the 2011 ozone rule?

Answer: Following advice from the EPA Advisory Council on Clean Air Compliance Analysis (COUNCIL), in the 2014 analysis EPA relied on a methodology to estimate the cost of unknown controls that used an average cost-per-ton for the needed emissions reductions. The agency agrees with the COUNCIL that the approach is both transparent and strikes a balance between the likelihood that some unidentified abatement would be achieved at costs that are lower than average and that some would be achieved at costs that are higher than average.

Question 4: In 2011, President Obama pulled the plug on this same proposal due to "regulatory burdens and regulatory uncertainty." Our economy was still struggling to recover from the recession, and the $90 billion price tag was something even he was unable to justify.

- Do you really think that our economy is in better shape now to handle a $3 trillion rule than it was in 2011?
- What has changed since the President's decision that signals now is an appropriate time to radically revise the standard before the benefits of the last one have been fully implemented?

Answer: Sections 108 and 109 of the Clean Air Act (CAA) govern the establishment, review, and revision, as appropriate, of the NAAQS to protect public health and welfare. The CAA requires the EPA to periodically review the air quality criteria the science upon which the standards are based and the standards themselves. This rulemaking is being conducted pursuant to these statutory requirements.

The EPA sets the National Ambient Air Quality Standards at a level that is requisite to protect the public health and welfare, based on the best available science. The U.S. Supreme Court ruled in Whitman v. American Trucking Associations, 531 U.S. 457 (2001), that under Section 109 of the Clean Air Act, the EPA may not consider the costs of implementation in setting standards.

Under the Clean Air Act, states ultimately determine what local measures may be required to address local sources of air pollution. For that reason, the EPA presents an illustrative estimation of the costs and benefits of complying with proposed revisions to a NAAQS. EPA estimates that reducing pollution to meet a revised ozone NAAQS in 2025 will yield health benefits of $6.4 to $13 billion annually for a standard of 70 ppb, and $19 to $38 billion annually for a standard of 65 ppb, except for California, which was analyzed separately. Nationwide costs, except California, are estimated at $3.9 billion in 2025 for a standard of 70 ppb, and $15 billion for a standard of 65 ppb. The estimated benefits of a strengthened ozone standard outweigh the estimated costs by as much as a ratio of $3.33 to $1.

For decades, ozone pollution has been reduced by the combined efforts of federal, state, tribal and local governments. The costs and benefits of federal rules are evaluated during the public process for each rule. More than forty years of experience with the Clean Air Act has shown that America

can build its economy and create jobs while cutting pollution to protect the health of our citizens and our workforce.

Question 5: Compared to just four years ago, EPA has lowered cost estimates for the same stringent ozone standards by as much as $51 billion. Have compliance costs for ozone controls really dropped by over 80% since 2010?

Answer: The cost estimates for the 2014 proposal are different than the 2010 reconsideration proposal because we are analyzing changes between different current and proposed standards, air quality, and needed emissions reductions. In part because of recent improvements in air quality and federal and state actions that will come into effect over the next decade, meeting the proposed standards will require fewer emissions reductions than the reconsideration, meaning the estimated costs are lower.

Question 6: Over the last four years, EPA has slashed its cost estimates for the same stringent ozone standards.

- Has the cost of compliance technologies gone down, or did EPA change the assumptions in its cost-benefit analysis?
- How much of that reduction is due to projected air quality improvements versus changes in EPA's control cost assumptions?

Answer: The cost estimates for the 2014 proposal are different than the 2010 reconsideration proposal because we are analyzing changes between different current and proposed standards, air quality, and needed emissions reductions. In part because of recent improvements in air quality and federal and state actions that will come into effect over the next decade, meeting the proposed standards will require fewer emissions reductions than the reconsideration, meaning the estimated costs are lower.

Question 7: In 2010, EPA projected that the same ozone standards that EPA is now proposing could cost as much as $44 billion per year. These are straight-up, added costs to American manufacturing. I'm concerned that, during this slow economic recovery, we are driving manufacturing out of the U.S., to other countries with lax environmental standards. In analyzing these proposed regulations, does EPA consider the effects of driving manufacturing offshore, to countries with little or no environmental controls?

Answer: The EPA sets the National Ambient Air Quality Standards at a level that is requisite to protect the public health and welfare, based on the best available science. The U.S. Supreme Court ruled in Whitman v. American Trucking Associations, 531 U.S. 457 (2001), that under Section 109 of the Clean Air Act, the EPA may not consider the costs of implementation in setting standards.

Under the Clean Air Act, states ultimately determine what local measures may be required to address local sources of air pollution. For that reason, the EPA presents an illustrative estimation of the costs and benefits of complying with proposed revisions to a NAAQS. EPA estimates that reducing pollution to meet a revised ozone NAAQS in 2025 will yield health benefits of $6.4 to $13 billion annually for a standard of 70 ppb, and $19 to $38 billion annually for a standard of 65 ppb, except for California, which was analyzed separately. Nationwide costs, except California, are estimated at $3.9 billion in 2025 for a standard of 70 ppb, and $15 billion for a standard of 65 ppb. The estimated benefits of a strengthened ozone standard outweigh the estimated costs by as much as a ratio of $3.33 to $1.

For decades, ozone pollution has been reduced by the combined efforts of federal, state, tribal and local governments. The costs and benefits of federal rules are evaluated during the public process for each rule. More than forty years of experience with the Clean Air Act has shown that America can build its economy and create jobs while cutting pollution to protect the health of our citizens and our workforce.

Question 8: High levels of natural background ozone may cause many otherwise clean states, especially in the West, to be unable to meet EPA's stringent ozone proposal even with costly emission controls.

- EPA says it can deal with these concerns through its "exceptional events" program. Yet, since 2008, Utah has submitted 12 exception event demonstrations, and EPA has yet to approve one. Historically, how many times has the exceptional exceedance policy been used by the states and EPA? How long and what was the cost to taxpayers each time it was used? How many times annually do you expect it to be needed going forward?
- EPA also says it can deal with these concerns through "Rural Transport Areas." Yet EPA has no track record for Rural Transport Areas under an 8 hour ozone standard like in the proposal. Why should we think the Agency can use Rural Transport Areas to provide regulatory relief to states with high background ozone?

Answer: Existing and upcoming EPA regulations and guidance will assist states in ensuring background ozone does not create unnecessary control obligations as they continue their work to improve air quality.

Assuming a state can provide an adequate assessment or demonstration to legally invoke regulatory relief, there are a few types of CAA-authorized relief that are described in the ozone NAAQS proposal. As examples, an area may be able to rely upon the exceptional events provisions of the Act to exclude certain emissions data from consideration during the process of area designations under the possible revised NAAQS, which could impact whether an area is designated nonattainment. An area also may be able to rely on the international emissions provisions of the Act when making attainment demonstrations, which could limit their ultimate control requirements. Finally the Administrator can determine that certain qualifying nonattainment areas are Rural Transport Areas, thus eliminating the need for states to develop an attainment plan. All of these CAA-authorized provisions have been used in the past for implementing ozone standards.

The states typically submit exceptional events demonstrations between the promulgation of a new or revised NAAQS and the initial area designations for that NAAQS, in order avoid designation as a nonattainment area through exclusion of data affected by exceptional events. The EPA recognizes the challenges associated with developing, submitting and reviewing exceptional events demonstration packages and is actively developing Exceptional Events Rule revisions and additional guidance on demonstrating ozone-related exceptional events associated with wildfire, which we anticipate proposing in the fall of 2015 and finalizing in the summer of 2016. This schedule will ensure the final rule revisions and ozone-related guidance are available in advance of implementation activities (e.g., Governors' designation recommendations) for any potential new or revised ozone NAAQS. Because states submit exceptional events demonstration packages directly to their reviewing EPA regional office, the EPA does not have a national tracking system for the submission, review, and expended resources associated with the exceptional events process. Some air agencies and EPA regions have developed their own processes, systems, and criteria to track exceptional event-related information.

Question 9: Yellowstone national park's current ozone level is 66ppb—

- Is the Agency considering setting a standard that is below the current ozone levels at Yellowstone National Park?
- I understand EPA has been criticized regarding the way background ozone concentrations are calculated and used. What steps is the agency taking to improve that process?

Answer: Based on a significantly expanded body of scientific evidence, including more than 1,000 new studies since the last review of the standards, the EPA is proposing that the current primary ozone standard set at a level of 0.075 ppm is not requisite to protect public health with an adequate margin of safety, and that it should be revised to provide increased public health protection. This proposed conclusion is supported by the independent group of science experts who form the Clean Air Science Advisory Committee (CASAC). Specifically, the EPA is proposing to revise the level of that standard to within the range of 0.065 ppm to 0.070 ppm to increase public health protection, including for "at-risk" populations such as children, older adults, and people with asthma or other lung diseases, against an array of ozone-related adverse health effects. For short-term ozone exposures, these effects include decreased lung function, increased respiratory symptoms and pulmonary inflammation, effects that result in serious indicators of respiratory morbidity such as emergency department visits and hospital admissions, and non-accidental mortality. For long-term ozone exposures, these health effects include a variety of respiratory morbidity effects and respiratory mortality.
Existing and upcoming EPA regulations and guidance will assist states in ensuring background ozone does not create unnecessary control obligations as they continue their work to improve air quality.

Question 10: I understand that EPA does not exclude Mexican and Canadian ozone emissions when it determines background levels of ozone. What could a county in my district due to control emissions in a foreign country?

Answer: Existing and upcoming EPA regulations and guidance will assist states in ensuring background ozone does not create unnecessary control obligations as they continue their work to improve air quality. For purposes of implementing the ozone standards, sources of ozone precursor emissions emanating from outside the U.S. are considered background sources. The CAA contains attainment planning provisions that allow states to account for international emissions that are beyond their control. If used appropriately, these provisions could limit the ultimate control requirements that would apply to local sources. These CAA provisions have been used in the past in implementing the ozone standards.

Question 11: High levels of ozone transported from Asia and Mexico may mean that many otherwise clean states, especially in the West, will be unable to meet EPA's stringent ozone proposal even with costly emission controls. EPA says it can deal with these concerns through Clean Air Act provisions on international transport.

- EPA has been notoriously slow in providing states similar regulatory relief for natural ozone under the Exceptional Events Program. Why should states believe that EPA will be any better in approving regulatory relief for international ozone transport?
- Will EPA commit to not designate as nonattainment any counties that fail the proposal's ozone standards because of international transport?

Answer: Existing and upcoming EPA regulations and guidance will assist states in ensuring background ozone does not create unnecessary control obligations as they continue their work to improve air quality.

Assuming a state can provide an adequate assessment or demonstration to legally invoke regulatory relief, there are a few types of relief that are included in the proposal. As examples, an area may be able to rely on existing CAA-authorized provisions to obtain relief from designation as a nonattainment area, or relief from adopting additional controls to demonstrate attainment.

Question 12: EPA halted implementation of the 2008 ozone standard from 2010-2012 while it reconsidered that standard. That delay put state implementation of the 2008 ozone standard well behind the normal schedule. States are now committing time and money to catch up on the 2008 ozone standard. In fact, EPA just issued the implementation rules for the 2008 standard on February 13, 2015. Why is EPA proposing new ozone standards when it hasn't given states a chance to implement the current ones?

Answer: Sections 108 and 109 of the Clean Air Act (CAA) govern the establishment, review, and revision, as appropriate, of the NAAQS to protect public health and welfare. The CAA requires the EPA to periodically review the air quality criteriathe science upon which the standards are basedand the standards themselves. This rulemaking is being conducted pursuant to these statutory requirements.

Question 13: EPA chose to project the costs of its proposed ozone standard to 2025, eight years after counties will be designated as nonattainment areas under the proposal.

- What consequences will those counties face while designated nonattainment?
- Does EPA's modeling capture the cost of lost economic activity that counties in nonattainment areas will experience during those eight years?

Answer: The Clean Air Act provides for a range of actions to take place when an area is designated nonattainment. The specifics are discussed in further detail in section VII.4 of the preamble to the proposed rule (Nonattainment Area Requirements beginning on 79 FR 75373).

Consistent with Executive Order 12866, and OMB guidance, the EPA prepared a Regulatory Impact Analysis accompanying the proposed updates to the ozone NAAQS that shows the benefits and costs of illustrative control scenarios that states may choose in complying. Because states have flexibility in how to meet their goals, the actions taken to meet the goals may vary from what is modeled in the illustrative scenarios. Specific details, including information about how costs and benefits are estimated for these illustrative scenarios are available in the RIA (http://www.epa.gov/ttn/ecas/regdata/RIAs/20141125ria.pdf).

Question 14: EPA chose to project the costs of its proposed ozone standard to 2025, saying that would be the year in which most counties would have to attain the standards if granted compliance extensions.

- Since EPA bases its entire economic analysis on these assumed extensions, will the Agency commit to extending compliance deadlines to the maximum extent possible when finalizing the ozone standards?
- If EPA assumed longer compliance deadlines, shouldn't it write those compliance extensions into the final rule?

Answer: The EPA intends to take action to provide for compliance flexibility similar to what has been provided under prior standards.

Question 15: EPA reassures that counties won't be designated as nonattainment areas under its proposed stringent ozone standards for another three years. But won't those new standards be immediately effective on PSD permits, making it harder for business to build and expand facilities to create new jobs?

Answer: New or modified major stationary sources that must get a PSD permit must show that the project will not cause or contribute to a violation of a revised ozone standard upon the effective date of that standard. The EPA has proposed a grandfathering provision for PSD permit applications that are administratively complete before the new NAAQS is signed, or where a draft permit or preliminary determination has been published before the effective date of a revised standard. Those in-pipeline permit applications meeting the qualification criteria in EPA's final rule would not need to be revised in order to be approved.

Question 16: EPA has said that most counties won't need to attain its stringent ozone standards until 2025. But counties in nonattainment areas will face severe regulatory consequences in just three years, and the new standards become immediately effective for permits to expand business. EPA seems to want us to think these proposed standards are a "next decade" problem, but aren't they a now problem?

Answer: Approximately 2 years after a standard is revised, the EPA is required to determine attainment and nonattainment areas. For areas designated nonattainment, additional preconstruction permitting requirements must be implemented and, depending on the severity of the poor air quality in the area, the state must begin developing attainment plans for the area. The first attainment deadline under the Act is three years following designation, which would be by the end of 2020 if areas are designated in the fall of 2017. This attainment deadline would apply only to those areas with air quality closest to the standard at the time of designation and such areas would not be required to develop an attainment plan.

Question 17: EPA can't even point to controls capable of almost half the emissions reductions needed in the east and all of the reductions required in California to meet its stringent proposed ozone standard. This sounds like shoot first, ask questions later rulemaking. Should we be imposing this much burden on the American people when EPA doesn't even know how this rule can be accomplished?

Answer: The U.S. Supreme Court ruled in *Whitman v. American Trucking Associations, 531 U.S. 457 (2001)*, that under Section 109 of the Clean Air Act, the EPA may not consider the costs of implementation in setting National Ambient Air Quality Standards. The Court indicated specifically that EPA was not to consider potential job losses due to implementation of a standard, even if such job losses "might produce health losses". 531 U.S. at 466. Moreover, if EPA were to consider such costs, it would be "grounds for vacating the NAAQS, because the Administrator had not followed the law". Id. at n. 4.

Under the Clean Air Act, states ultimately determine what local measures may be required to address local sources of air pollution. For that reason, the EPA presents an illustrative estimation of the costs and benefits of complying with proposed revisions to a NAAQS. EPA estimates that reducing pollution to meet a revised ozone NAAQS in 2025 will yield health benefits of $6.4 to $13 billion annually for a standard of 70 ppb, and $19 to $38 billion annually for a standard of 65 ppb, except for California, which was analyzed separately. Nationwide costs, except California, are estimated at $3.9 billion in 2025 for a standard of 70 ppb, and $15 billion for a standard of 65 ppb. The estimated benefits of a strengthened ozone standard outweigh the estimated costs by as much as a ratio of $3.33 to $1.

For decades, ozone pollution has been reduced by the combined efforts of federal, state, tribal and local governments. More than forty years of experience with the Clean Air Act has shown that America can build its economy and create jobs while cutting pollution to protect the health of our citizens and our workforce.

Question 18: EPA's modeling for its proposed stringent ozone standards caps costs for emissions reductions required from so-called "unknown controls" based on costs of known controls. This defies the basic economics of increasing marginal costs. Does EPA really believe that the costs of reaching the highest low-hanging fruit are the same as those to get the fruit at the top of the tree?

Answer: Following advice from the EPA Advisory Council on Clean Air Compliance Analysis (COUNCIL), in the 2014 analysis EPA relied on a methodology to estimate the cost of unknown controls that used an average cost-per-ton for the needed emissions reductions. The agency agrees with the COUNCIL that the approach is both transparent and strikes a balance between the likelihood that some unidentified abatement would be achieved at costs that are lower than average and that some would be achieved at costs that are higher than average.

Question 19: We hear a lot about the need to repair "crumbling roads and bridges." However, stringent ozone standards could make it harder for states to show that proposed highway project "conform" with ozone standards. Has EPA considered the economic and safety impacts that could result if these stringent ozone standards block crucial transportation projects?

Answer: Road maintenance and safety projects are exempted from transportation conformity requirements. The transportation conformity rule provides exemptions for a number of project types that address needed repairs and the need to improve highway safety. These include:

- reconstructing bridges as long as the number of travel lanes is not increased;
- pavement resurfacing and/or rehabilitation;
- pavement marking;
- projects that correct, improve or eliminate a hazardous location or feature;
- projects that increase sight distance;
- installation of guardrails, median barriers and crash cushions;
- lighting improvements; and
- projects that improve safety at railroad crossings.

The EPA places a high priority in assisting areas to determine exempt projects and to make required conformity determinations for other projects.

Question 20: According to EPA, ozone-forming emissions have been cut in half in the last three decades. This progress will continue under current regulations. Wouldn't you agree that Americans are already enjoying the benefits of cleaner air, and will enjoy even more future benefits, regardless whether the existing standards are adjusted?

Answer: The Clean Air Act requires primary NAAQS that are "requisite to protect the public health" with an "adequate margin of safety." The EPA is proposing that the current primary ozone (O3) standard set at a level of 0.075 ppm does not meet this requirement, and that it should be revised to provide increased public health protection. Specifically, the EPA is proposing to retain the indicator (ozone), averaging time (8-hour) and form (annual fourth-highest daily

maximum, averaged over 3 years) of the existing primary O3 standard and is proposing to revise the level of that standard to within the range of 0.065 ppm to 0.070 ppm. EPA analyses indicate that most of the country will be able to meet a revised standard with a level in this range, based on existing federal control requirements.

Question 21: EPA's modeling indicates that its proposed ozone standards may actually increase mortality in cities like Houston. Can you please explain how this proposal could end up increasing deaths in some areas?

Answer: The proposed revisions to the National Ambient Air Quality Standards for ozone discussed the possibility that some control strategies designed to reduce the highest ambient ozone concentrations can also result in increases in relatively low ambient ozone concentrations. That discussion can be found at http://www.gpo.gov/fdsys/pkg/FR-2014-12-17/pdf/2014-28674.pdf. We are currently reviewing comments on this interaction, and other issues raised by the proposal. The proposal, based on extensive scientific evidence, found that reducing high ozone concentrations will reduce risk – including risk of ozone-related mortality - broadly across the country. This includes the risk associated with exposure to high ozone concentrations in all of the urban areas evaluated in the risk and exposure assessment.

Question 22: Ozone is mainly outdoors. Yet most people spend 90% of their time indoors. Do you think this is why recent published studies found that indoor air quality and poverty were much more strongly linked to asthma than outdoor air quality?

Answer: The Clean Air Act directs the EPA to set National Ambient Air Quality Standards to limit harmful pollutants in the atmosphere. The EPA's proposed revision to the ozone NAAQS is based on extensive scientific evidence, including more than 1,000 new studies since the last review of the standards. This evidence shows that ozone can harm public health and welfare. The proposed updates will improve public health protection, particularly for children, the elderly, and people of all ages who have lung diseases such as asthma.

Question 23: Only 1 of the 12 studies considered by EPA show any link between long-term ozone exposure and mortality. And this study did not find any link in California, where ozone levels are the highest in the country. Shouldn't we be concerned that EPA is cherry-picking science to support its regulatory agenda?

Answer: Based on a significantly expanded body of scientific evidence, including more than 1,000 new studies since the last review of the standards, the EPA is proposing that the current primary ozone standard set at a level of 0.075 ppm is not requisite to protect public health with an adequate margin of safety, and that it should be revised to provide increased public health protection. This proposed conclusion is supported by the independent group of science experts who form the Clean Air Science Advisory Committee (CASAC). Specifically, the EPA is proposing to revise the level of that standard to within the range of 0.065 ppm to 0.070 ppm to increase public health protection, including for "at-risk" populations such as children, older adults,

and people with asthma or other lung diseases, against an array of ozone-related adverse health effects. For short-term ozone exposures, these effects include decreased lung function, increased respiratory symptoms and pulmonary inflammation, effects that result in serious indicators of respiratory morbidity such as emergency department visits and hospital admissions, and nonaccidental mortality. For long-term ozone exposures, these health effects include a variety of respiratory morbidity effects and respiratory mortality.

Question 24: I'm concerned that EPA is cherry-picking and contorting science to support its ozone proposal. For instance, one study found no statistically significant difference in lung function in humans exposed to ozone at levels above and below the standards in EPA's ozone proposal. Yet EPA "reanalyzed" that data and decided there was a statistically significant impact after all leading that study's author to say that EPA "misinterpreted" his data. Shouldn't EPA just go where the science points, rather than trying to shoehorn findings into its regulatory agenda?

Answer: In reviewing a significantly expanded body of scientific evidence, including more than 1,000 new studies since the last review of the standards, the EPA in some instances conducted further analysis of the data underlying the studies. This review and these analyses are discussed in the Integrated Science Assessment, the Health Risk and Exposure Assessment and the Policy Assessment. Each of these documents are available at http://www.epa.gov/ttn/naaqs/standards/ozone/s_o3_index.html. Based on the body of scientific evidence, the EPA is proposing that the current primary ozone standard set at a level of 0.075 ppm is not requisite to protect public health with an adequate margin of safety, and that it should be revised to provide increased public health protection. This proposed conclusion is supported by the independent group of science experts who form the Clean Air Science Advisory Committee (CASAC).

Question 25: All of the clinical studies cited by CASAC in support of the 60 ppb standard were created by the EPA. Yet, all of the non-EPA literature on health impacts of 60 ppb ozone cited by CASAC does not support a 60 ppb standard. Is this what EPA meant when it said that "increasing uncertainty in the scientific evidence at lower ozone concentrations" led it to not include a 60 ppb standard in the ozone proposal?

Answer: Compared to ozone standard levels from 65 to 70 ppb, the extent to which standard levels below 65 ppb could result in further public health improvements becomes notably less certain. For example, as explained in the preamble to the proposed rule (79 FR 75309), there are uncertainties associated with the adversity of exposures to 60 ppb of ozone, particularly single occurrence of such exposures; air quality analyses in locations of multicity epidemiologic studies; and epidemiology-based risk estimates. The EPA determined that it is not appropriate to place significant weight on these factors or to use them to support the appropriateness of standard levels below 65 ppb.

Question 26: EPA has released maps showing only the projected counties in non-attainment in 2025.

- Under EPA guidance does the agency designate non-attainment area boundaries starts with metropolitan area as the "presumptive" nonattainment area? Why are your maps inconsistent with your guidance?

Answer: The EPA has not yet issued guidance for designating areas for a potentially revised ozone standard, but intends to do so shortly after any standard is revised. Nonattainment area boundaries for a revised ozone standard will depend on a number of factors that are currently highly uncertain.

Question 27: How many counties still do not meet the 1997 ozone standards? How about the 2008 standards? Doesn't it make sense to work on attaining the existing standards, the tightest standards ever, before promulgating new standards?

Answer: The 1997 ozone standard was revoked on April 6, 2015. However, before that revocation, as of April 1, 2015, there were 7 designated nonattainment areas (consisting of 36 counties) that had not yet attained the standard based on preliminary 2014 ozone monitoring data. For the 2008 ozone standard, there are, as of April 1, 2015, 28 designated nonattainment areas (consisting of 163 counties) that have not yet attained the standard based on preliminary 2014 ozone monitoring data.

The EPA sets the National Ambient Air Quality Standards at a level that is requisite to protect the public health and welfare, based on the best available science. The U.S. Supreme Court ruled in Whitman v. American Trucking Associations, 531 U.S. 457 (2001), that under Section 109 of the Clean Air Act, the EPA may not consider the costs of implementation in setting standards.

Question 28: Why does EPA leave California off of its maps and analyses? If California is being give a longer period of time to attain the standards, shouldn't other places in the country be granted that latitude as well? How much ($/ton) are NOx offset reductions selling for in Houston? Los Angeles? Other places?

Answer: While EPA analyzed costs and benefits for California separately from the rest of the United States, all of these analyses are described in full in the Regulatory Impact Analysis for the ozone proposal. The maximum amount of time a nonattainment area has to attain the standards is dictated by specific provisions of the Clean Air Act, and depends on the area's classification. Because a number of California counties likely would have attainment dates ranging from 2032 to late 2037, California is not shown on maps that illustrate projected attainment status in 2025.

The EPA does not centrally track or collect data on the selling prices of emissions offsets. Offset transactions are typically private transactions between emissions sources and the price paid per ton of emissions used for offsets is not required to be reported or disclosed to the EPA by permit applicants.

Climate

Question 1: The budget request includes a $4 Billion incentive program for states that reduce CO2 emissions beyond the existing source proposal.

- How do you propose to implement this program?
- Do you plan to send Congress a legislative proposal?
- If the proposal is to give states money if they go beyond EPA mandates, will the result be to transfer taxpayer dollars away from states with large emission reduction burdens under your plan to states that have a smaller burden. For example, Vermont has no emissions reduction obligation under your plan because its power plants are small. So, would you automatically transfer taxpayer money from Southeastern and Southwestern states to Vermont?

Answer: The FY 2016 President's Budget includes an incentive fund for States choosing to go beyond the Clean Power Plan, which will be finalized this summer. The Clean Power State Incentive Fund will provide $4 billion to support States exceeding the minimum requirements established in the final Clean Power Plan for the pace and extent of carbon pollution reductions from the power sector. This funding will enable States to invest in a range of activities that complement and advance the Clean Power Plan, including efforts to address disproportionate impacts from environmental pollution in low-income communities and support for businesses to expand efforts in energy efficiency, renewable energy, and combined heat and power through, for example, grants and investments in much-needed infrastructure.

Each state with an emissions reduction goal under the Clean Power Plan will have a reserved portion of the Fund, based on a combination of population and state power sector emissions. States across the country are well-positioned to act quickly and resolutely to reduce carbon pollution from the power sector—beyond the requirements of the final Clean Power Plan. If a state elects not to participate, its funding allocation will return to the Treasury. Additional details on the Fund will be made available this summer.

Question 2: With respect to the Clean Power Plan, your justification statement says: "In FY 2016, the EPA will encounter a staggering workload to implement these rules and agency resources have been shifted to help meet the demand. Because of the breadth, complexity and precedent-setting nature of work, the agency expects a marked increase in demands for legal counsel in both headquarters and Regional Offices. In addition, each EPA action is expected to be challenged in court, which will require skilled and experienced attorneys specialized in the Clean Air Act to devote significant resources to defense of these actions."

- In your own budget justification statement you say that these rules will result in a "staggering workload" to implement and defend these two rules. Don't you think those taxpayer dollars would be better spent increasing funding to states to implement existing programs rather than spending it on lawyers?

Answer: Successfully addressing climate change will require the EPA and State governments to work together, and the President's proposed budget provides additional resources for that work, both to the Agency and to the states.

With additional legal counselling resources, the EPA would provide significant benefits to our partners, stakeholders, and regulated communities. For example, counseling attorneys work closely with their program clients in rule development to ensure stakeholder input is appropriately considered. EPA counseling lawyers are also a vital resource to States as States develop implementation plans under the Clean Air Act.

The President's proposed budget also provides significant resources for States. It includes $25 million in grants for States to develop their Clean Power Plan strategies, and sets up a Clean Power State Incentive fund of $4 billion.

Question 3: Recent correspondence between your agency and the House Energy and Commerce Committee indicated EPA has not "explicitly modeled the temperature impacts of the Clean Power Plan" and could not state what, if any impact the rule would have on global temperatures or sea rise levels.

- Why hasn't EPA done the modeling? Is it a matter of budgeting?
- Why is your agency attempting to impose this extremely complex rule and spend billions of taxpayer dollars to address global warming when you haven't even checked to see if the rule would actually achieve your global warming goals?

Answer: The EPA included with the proposed Clean Power Plan a Regulatory Impact Analysis that estimated the total monetized climate-related benefits and costs of the rule, following applicable statutes, Executive Orders, and other guidance. Although the EPA has not explicitly modeled the temperature or sea level rise impacts of this rule, the Clean Power Plan is an important and significant contribution to emission reductions, thereby slowing the rate of global warming and associated impacts.

Question 4: Your budget would eliminate funding under the Indoor Radon Abatement Act which authorizes grants to states to address radon (-$8 million) even though indoor radon is the second-leading cause of lung cancer and the leading cause of lung cancer for non-smokers and the funding was targeted this funding to support states with the greatest populations at highest risk. According to your Budget in Brief, indoor radon causes an estimated 21,000 lung cancer deaths annually in the U.S. Carbon dioxide causes no deaths.

- Why would the budget propose spending $279 million to rework the U.S. energy economy (climate regulations) while ignoring real environmental threats?

Answer: Over the past 23 years, the State Indoor Radon Grant program has provided funds to support states's efforts to reduce risks from radon exposure to establish their own programs. Because exposure to radon gas continues to be an important risk to human health, in FY 2016 the

EPA will continue to focus on reducing radon risk in homes and schools, including through partnerships with the private sector, remaining state programs and public health groups, as well as driving action at the national level with other Federal agencies, through the Federal Radon Action Plan. The EPA also will continue information dissemination, participation in the development of codes and standards, and social marketing techniques aimed at informing the public on the risks of radon.

Question 5: Section 110(c) of the Clean Air Act requires EPA to issue a Federal implementation Plan (FIP) if a state does not submit a State Implementation Plan (SIP), does not submit a satisfactory SIP or does not make a satisfactory SIP revision (42 U.S.C. 7410(c)). Please provide a list of enforcement mechanisms with cites to the relative legal authority the EPA will use to enforce all components of a federal plan on a state that does not does not submit a SIP, does not submit a satisfactory SIP - in whole or in part - or fails to make a satisfactory revision that meets the criteria of the proposed Clean Power Plan.

Answer: Under Section 111(d) the EPA is proposing a two-part process where the EPA sets state-specific goals to lower carbon pollution from power plants, and then the states must develop plans to meet those goals. States develop plans to meet their goals, but EPA is not prescribing a specific set of measures for states to put in their plans. This gives states flexibility. States will choose what measures, actions, and requirements to include in their plans, and demonstrate how these will result in the needed reductions. The Clean Air Act provides for EPA to write a federal plan if a state does not put an approvable state plan in place. In response to requests from states and stakeholders since the proposed Clean Power Plan was issued, EPA announced in January 2015 that we will be starting the regulatory process to develop a rule that would set forth a proposed federal plan and could provide an example for states as they develop their own plans. EPA's strong preference remains for states to submit their own plans that are tailored to their specific needs and priorities. The agency expects to issue the proposed federal plan for public review and comment in summer 2015.

Question 6: During the hearing, I asked you if the EPA would consider withholding federal highway funding if a state that does not submit a SIP, does not submit a satisfactory SIP - in whole or in part - or fails to make a satisfactory revision that meets the criteria of the proposed Clean Power Plan. You responded,

> "Ms. McCarthy. This is not a traditional State SIP under the national ambient air quality standards. There are other processes for us to work with States. Clearly our hope is that States will provide the necessary plans. If not, there will be a federal system in place to allow us to move forward."

Will you clarify for the record whether EPA would consider withholding federal highway funding to enforce any elements of the proposed Clean Power Plan?

Answer: When the EPA finalizes the Clean Power Plan we will be very clear that sanctions will not be imposed for a state's failure to submit or enforce a state plan under the Clean Power Plan.

WATERS OF THE UNITED STATES

Question 1: Please provide me with examples where EPA or the Corps has used a groundwater connection to establish jurisdiction over a body of water that has no surface connection, direct or indirect, to a navigable water. For any such examples, please also provide the distance between the body of water that lacks such a surface connection and the nearest water of the United States. Please exclude any allegations that a groundwater connection establishes the existence of a point source discharge where the body of water with no surface connection was itself determined to be a point source, rather than a water of the United States.

Answer: The agencies existing regulations and guidance allow for establishing that a wetland is adjacent to jurisdictional tributary based on the presence of a confined surface or shallow subsurface connection. This connection would then serve as the basis for determining whether a significant nexus with a downstream traditional navigable water is present. This is explicitly recognized in the agencies' 2008 (post-*Rapanos*) guidance documents. Federal courts have upheld jurisdiction consistent with this regulation and guidance, relying on a groundwater connection as the basis for a significant nexus finding. See *Northern California River Watch v. City of Healdsburg.* The agencies make clear in the final Clean Water Rule that groundwater is never jurisdictional under the Clean Water Act.

Question 2: Is it currently the national policy of either EPA or the Corps of Engineers to establish jurisdiction over all wetlands in flood plain?

Answer: No. Existing law and policy requires the agencies to determine, on a case-specific basis, whether or not a particular wetland located in the floodplain is jurisdictional. Location in the floodplain does not itself make a wetland jurisdictional.

Question 3: Is it currently the national policy of either EPA or the Corps of Engineers to establish jurisdiction over all waters in flood plain?

Answer: No. Existing law and policy requires the agencies to determine, on a case-specific basis, whether or not a particular water located in the floodplain is jurisdictional. Location in the floodplain does not itself make a water jurisdictional.

HYDRAULIC FRACTURING

Question 1: The EPA continues its study into the relationship between drinking water and hydraulic fracturing, which was initiated in 2010. Well over $20 million has been spent on this study and the timeline continues to slip. In fact, the draft assessment report was expected in December 2014 yet today, there is no indication when this will be released.

- What is the current timeline for release of the EPA's drinking water study?
- Will the report undergo interagency review prior to its release? If so, which agencies will be a part of the review? If not, why not?
- After the draft assessment report is released, what is the timeline moving forward?

Answer: 1) To date, the EPA's hydraulic fracturing drinking water study has produced 25 scientific products, including 12 EPA technical reports. Additionally, on June 4, 2015, the EPA released the draft hydraulic fracturing drinking water assessment report. The assessment is a state-of-the-science integration and synthesis of over 950 publications and sources of data. The draft assessment was released for public comment, and submitted to the EPA Science Advisory Board for external, independent peer review.

2) The EPA shared findings from the draft hydraulic fracturing drinking water assessment report with other federal agencies and departments prior to the release of the assessment on June 4.

3) The draft assessment report was released for public comment and peer review on June 4, 2015. The EPA Science Advisory Board will conduct the external peer review of the draft assessment. Their preliminary schedule for review includes several teleconferences and an October 28-30, 2015 meeting of the SAB ad hoc review panel. The SAB anticipates release of the final peer review report in spring 2016. After receipt of the SAB's peer review report, EPA will finalize the hydraulic fracturing drinking water assessment report. The final report will reflect SAB input and the input of submitted public comments. The EPA anticipates completing the final assessment report in 2016.

Question 2: You've said that hydraulic fracturing can be done safely and have agreed with former EPA Administrator Lisa Jackson that there have been no confirmed cases of hydraulic fracturing impacting drinking water. The White House Council on Economic Advisors released a report last week that touted the economic benefits because of the increase in domestic oil and natural gas and clearly linked the production increases to the use of hydraulic fracturing and horizontal drilling. What is your vision for getting the American public to understand that hydraulic fracturing is safe and that fracking has unlocked an American energy revolution that has lowered all Americans's energy prices, created jobs, helping lower GHG emissions and revitalizing such industries as the manufacturing, steel and chemical sectors?

Answer: The EPA's vision is to make sure that the American public has the best scientific information available to understand the potential impacts of hydraulic fracturing activities on drinking water resources. Once EPA responds to public and SAB peer review comments and

finalizes the assessment, EPA expects that it will be a critical resource for state regulators, tribes, local communities, and industry who can use the information to better identify how best to protect public health and drinking water resources.

The hydraulic fracturing drinking water assessment report identified potential vulnerabilities to drinking water resources due to hydraulic fracturing activities. The draft assessment concluded that there are both above and below ground mechanisms by which hydraulic fracturing activities have the potential to impact drinking water resources. These mechanisms include water withdrawals in time of or in areas with low water availability, spills of hydraulic fracturing fluids and produced water; fracturing directly into underground drinking water resources; below ground migration of liquids and gases; and inadequate treatment and discharge of waste water.

We found specific instances where one or more mechanisms led to impacts on drinking water resources, including contamination of drinking water wells. The number of cases, however, was small compared to the number of hydraulically fractured wells.

This finding could reflect a rarity of effects on drinking water resources, but may also be due to other limiting factors. These factors include: insufficient pre-and post-fracturing data on the quality of drinking water resources; the paucity of long-term systematic studies; the presence of other sources of contamination precluding a definitive link between hydraulic fracturing and an impact; and the inaccessibility of some information on hydraulic fracturing activities and potential impacts.

Question 3: In the draft FY 2016 budget proposal, it states that EPA will respond to peer review comments from the Agency's Science Advisory Board (SAB) in order to finalize the study. It further suggests that the report will provide a synthesis of the state of the science, including the results of research focused on whether hydraulic fracturing affects drinking water resources, and if so, will identify the driving factors.

- Clearly you already have a plan for additional research. Can you share those plans?
- More importantly, will the Agency actually consider the recommendations of its own Science Advisory Board in this process, particularly if those recommendations do not align with EPA's own research initiatives, which you just addressed?

Answer: The President's FY 2016 budget request includes $4.0M to address the peer review and public comments received on the Hydraulic Fracturing Drinking Water Assessment report, including performing additional analyses in response to these comments.

The Department of Energy, Department of Interior, United States Geological Service, and EPA developed the Federal Multiagency Collaboration on Unconventional Oil and Gas (UOG) to coordinate on-going and future high priority research associated with safely and prudently developing onshore shale gas, tight gas, shale oil, and tight oil resources. The three agencies shared the "Federal Multiagency Collaboration on Unconventional Oil and Gas Research – A Strategy for Research and Development" (Strategy) in July 2014 (http://unconventional.energy.gov/pdf/Multiagency_UOG_Research_Strategy.pdf). Separate from the hydraulic fracturing drinking water assessment, resources are requested to further

research outlined in the Strategy to better understand and mitigate the potential impacts of UOG practices.

Throughout the development of hydraulic fracturing drinking water assessment, the EPA has actively engaged input from the agency's Science Advisory Board (SAB). A previous SAB panel provided comment on the hydraulic fracturing study plan published in 2011. A separate SAB panel provided comment on the hydraulic fracturing drinking water study progress report published in 2012. The same SAB ad hoc panel will review the draft assessment report. The external peer review by the SAB is expected to provide detailed comments and suggestions concerning the draft assessment. EPA will consider and evaluate all comments received from the SAB. SAB comments, along with comments received from the public, will help inform and guide the EPA as it develops the final draft of the assessment.

Question 4: Director McCarthy, the President's new economic report says that 1) "natural gas is already playing a central role in the transition to a clean energy future," 2) that an effective regulatory structure for addressing environmental concerns already "exists primarily at the State and local level," and 3) that unconventional natural gas production technology unleashed in the U.S. "can help the rest of the world reduce its dependence on high-carbon fuels." Given this positive view from the White House, which is supported by a broad scientific consensus, how do you intend to ensure that your agency's proposed regulations on methane will not short-circuit the U.S. energy revolution that is driving so much job creation?

- Can we assume that the upcoming EPA study on hydraulic fracturing will not conflict with this latest White House report that recognizes the clear advantages of unconventional energy development?

Answer: Responsible development of America's shale gas resources offers important economic, energy security, and environmental benefits. Recognizing this, in April 2012, President Obama signed E.O. 13605, Supporting Safe and Responsible Development of Unconventional Domestic Natural Gas Resources, which, among other things, charges federal agencies to pursue multidisciplinary, coordinated research. The EPA is working with other federal agencies, states and other stakeholders to understand and address potential concerns with hydraulic fracturing so the public has confidence that natural gas production will proceed in a safe and responsible manner.

The EPA's study of the potential impacts of hydraulic fracturing for oil and gas on drinking water resources in the United States reflects the multiple, complex activities associated with the use of water in hydraulic fracturing, beginning with water acquisition and ending with the wastewater treatment and disposal. When completed, the products from the EPA's hydraulic fracturing study are intended to provide information needed to inform decision-makers involved with ensuring that hydraulic fracturing activities do not impact the nation's drinking water resources.

Question 5: In February 2014 the EPA's IG sent a memo to the EPA Office of Water outlining an initiative the IG has underway that will "determine and evaluate what regulatory authority is available to the EPA and states, identify potential threats to water resources from

hydraulic fracturing, and evaluate the EPA's and states' responses to them." Do you consider this a duplication of the EPA's efforts as it relates to the multi-year and multi-million dollar hydraulic fracturing and water study currently in process at the EPA and if not, then how do these studies differ? Hasn't EPA independently done this type of evaluation (see the letter from EPA to NRDC)?

Answer: The OIG does not consider its evaluation in this case as duplicative of the study by the EPA's Office of Research and Development (ORD). ORD's Final Study Plan is scoped to the hydraulic fracturing water lifecycle, defined by ORD to include water acquisition, chemical mixing, injection, flowback and produced waters, and wastewater treatment. The OIG will not undertake a review of these matters. The OIG is not conducting independent scientific evaluations, laboratory studies or toxicological studies as planned in ORD's study.

SRF PROGRAM

Question 1: It is my understanding that since the program's inception in 1988, the Clean Water State Revolving Loan Funds have provided a total of $105 billion in assistance, leveraging federal capitalization grants totaling approximately $36.2 billion. Further, since the program's inception in 1997, Drinking Water State Revolving Loan Funds have provided approximately $33 billion in assistance, leveraging federal capitalization grants totaling approximately $19 billion. This means that for every federal dollar invested in the Clean Water SFR community wastewater systems have received nearly $3 dollars in assistance and for every dollar in the Drinking Water SRF community water systems have received approximately $1.75 dollars in assistance.

- Do you agree that the SRF program has been among the most successful programs we have in government?
- It that is so, why does the President's budget perennially underfund these programs?

Answer: a. Yes, and the Administration strongly supports the successful Clean Water and Drinking Water State Revolving Loan Fund programs.

b. The President's FY16 budget request recognizes that both SRF programs report long-running significant water infrastructure needs. In FY16, the Administration is requesting a total of $2.3 billion for the SRF programs - $1.186 billion for the DWSRF and $1.116 billion CWSRF. In addition, the FY16 request includes $50 million in technical assistance, training, and other efforts to enhance the capacity of communities and states to plan and finance drinking water and wastewater infrastructure improvements. The FY16 budget also requests funds to lay the groundwork for a Water Infrastructure Finance and Innovation Act of 2014 (WIFIA) program that would provide additional assistance. EPA has also launched the Water Infrastructure and Resilience Finance Center to help communities address their wastewater, drinking water, and stormwater needs within constrained budgets, particularly through innovative financing and by building resilience to climate change.

Question 2: Under the Clean Water Act, EPA is supposed to send a report to Congress on the funding needs for both wastewater and drinking water infrastructure. The last report to

Congress on wastewater needs was based on the 2008 Clean Water Needs Survey. The estimate of need in that survey -- $298 billion over 20 years – is woefully out of date. That estimate is based on cities' own capital improvement plans. It does not reflect new mandates like the hugely costly sewer overflow control measures that EPA is imposing on cities in enforcement actions or costly new requirements for nutrient reductions and stormwater controls.
By failing to provide an updated estimate of needs, EPA is doing a disservice to Congress, to cities, and to itself. We all need reliable information to make good decisions and EPA is required by law to update the needs survey every 4 years.

- When will EPA provide Congress with the updated the Clean Water Needs Survey?

Answer: The 2012 Clean Water Needs Survey Report to Congress is currently undergoing review. When the review is complete and the Report is cleared, it will be immediately provided to Congress.

Question 3: We all know that the needs for both water and wastewater are huge. According to the U.S. Conference of Mayors, cities are spending $115 billion a year to provide water and wastewater services and meet federal mandates. So, the proposal to provide a combined $2.3 billion for the Clean Water and Drinking Water State Revolving Funds is a drop in the bucket. Since the federal government does not provide funding to meet those mandates, I think it is important to take a hard look at how we are asking cities to spend their citizen's money.

- We all support clean and safe water. But, I am told that EPA enforcement officials extract penalties on top of commitments of hundreds of millions of dollars to address sewer overflows. Is that right?
- I also am told that EPA enforcement officials will require complete elimination over sewer overflows if they think a city can pay for it, when a less expensive approach could meet water quality standards. Is that right? Is EPA requiring cities to do more than meet the standards that states have set and EPA has approved that will protect water quality?

Answer: Sewer overflows, which contain raw sewage, may present significant environmental and human health risks to communities. Raw sewage contains bacteria, viruses, parasites, industrial wastewater, and inhalable mold and fungi which can be particularly problematic for children and the elderly.

The ability to assess a penalty when appropriate is important both to ensure future compliance and meet the standard under which courts review such consent decrees. Under the EPA's current approach, the agency tailors the terms of a settlement agreement, including any civil penalty, to the individual facts and circumstances of each case. Moreover, in determining appropriate civil penalties, the EPA uses the significant flexibility provided under the EPA's Clean Water Act Penalty Policy (including consideration of a city's specific financial circumstances) to substantially mitigate civil penalties in municipal cases. The agency remains committed to ensuring that we take into account the individual circumstances of each community, so that we can meet the objective

we share with every community to achieve clean water and encourage future compliance with the Clean Water Act in a way that makes sense for that community.

For combined sewer systems, the level of control is governed by the Combined Sewer Overflow Control Policy, with which each "permit, order, or decree" for municipal combined sewer system discharges "shall conform" as required by Congress in section 402(q) of the Clean Water Act.[1] The Clean Water Act requires permit holders to meet both water quality and technology standards and either can govern the requirements for compliance.

Separate sanitary sewer systems must be designed to contain and treat raw sewage generated by a community. An enforceable requirement of National Pollutant Discharge Elimination System (NPDES) permits is that cities properly operate and maintain their sewer collection and treatment systems.

[1] Link to CSO Control Policy: http://water.epa.gov/polwaste/npdes/cso/upload/owm0111.pdf

Question 4: Given the enormous cost of meeting water and wastewater mandates, affordability is a significant issue. It is my understanding that at EPA Headquarters, you talk about giving cities more time to meet mandates; you talk about adaptive management; and you talk about using green infrastructure alternatives. However, when they bring enforcement actions against cities, EPA regions and Headquarters enforcement officials are not providing these flexibilities.

- How are you addressing the real affordability concerns of cities?
- Do you think your enforcement officials should try to extract every last dollar from a city that you claim they can afford even if spending more money will not provide additional water quality benefits?
- If a city steps up and agrees to spend hundreds of millions or in some cases billions of dollars, do you think it is also appropriate to impose penalties on that city when the penalty will simply go to the U.S. Treasury and will reduce the amount of funding available to help improve the environment?

Answer: The EPA is sensitive to the significant investment cities must make to ensure clean and safe water. The EPA's guidance "Combined Sewer Overflows Guidance for Financial Capability Assessment and Schedule Development" (FCA Guidance), adopted in March 1997, provides a flexible framework for considering the site-specific factors that impact a given community's rate base.[1] The guidance encourages communities to consider and present any other documentation of their unique financial circumstances so that it may be considered as part of the analysis. These flexibilities were further clarified in November 2014, in the EPA's "Financial Capability Assessment Framework for Municipal Clean Water Act Requirements," which was developed with significant input from a variety of stakeholders including the United States Conference of Mayors, the National League of Cities, and the National Association of Counties.[2] As detailed in the EPA's January 13, 2013, "Assessing Financial Capability for Municipal Clean Water Act Requirements" Memorandum, nothing in the federal Clean Water Act prohibits communities from introducing a sewer rate structure based on differential household incomes.[3] Section 204(b)(1) of the Clean Water Act recognizes the use of lower rates for low-income residential users as satisfying the stipulation that recipients of services must pay their proportionate

share. The EPA's regulations at 40 C.F.R. Section 35.2140(i) reflect this and authorize low-income residential user rates. Local officials have a great deal of latitude under these regulations and the EPA continues to encourage communities to consider and adopt rate structures that ensure that lower-income households continue to be able to afford vital wastewater services.

The EPA utilizes its Clean Water Act Penalty Policy to provide flexibility to substantially mitigate civil penalties in municipal cases, including taking into account a city's specific financial circumstances.[4] The agency remains committed to ensuring that we consider the individual circumstances of each community so that we can meet our shared objective of achieving clean water and encouraging future compliance with the Clean Water Act in a way that makes sense for individual communities.

[1] CSO Guidance for FCA and Schedule Development: http://water.epa.gov/polwaste/npdes/cso/upload/csofc.pdf
[2] FCA Framework Memo: http://water.epa.gov/polwaste/npdes/cso/upload/municipal_fca_framework.pdf
[3]Link to Assessing Financial Capability for Municipal Clean Water Act Requirements Memo: http://water.epa.gov/polwaste/npdes/stormwater/upload/sw_regionalmemo.pdf
[4]CWA Penalty Policy: http://www2.epa.gov/sites/production/files/documents/cwapol.pdf

Question 5: I am very concerned that the way EPA looks at affordability when they decide what mandates to impose on communities means that our poorest citizens will end up paying 10% or more of their income on sewer bills.

Last Congress, in Title V of the Water Resources Reform and Development Act, we amended the Clean Water Act to give direction on how to identify what communities would experience a significant hardship raising the revenue to finance projects to meet Clean Water Act mandates. One of the criteria that we listed in the statute is whether the area is considered economically distressed under the Public Works and Economic Development Act. Under this Act, a community or area within a larger political boundary is economically distressed when –

- the per capita income at 80% or less than national average,
- unemployment is 1% or more greater than national average, or
- there is an actual or threatened severe unemployment or economic adjustment.

This information is provided by the community and must be accepted unless the Secretary of Commerce determines it is inaccurate.

- Will EPA also incorporate this approach into your evaluation of affordability when taking enforcement action?

Answer: The EPA is committed to implementing the Clean Water Act requirements in a sustainable manner, and will continue to work with permit holders toward our shared goals of clean water. The EPA's enforcement program encourages permit holders to submit any documentation that would create a more accurate and complete picture of their financial capability, which could include the type of information listed below. The EPA's "Financial Capability Assessment Framework for Municipal Clean Water Act Requirements" provides examples of information that may prove relevant in negotiating schedules.[1]

[1] FCA Framework Memo: http://water.epa.gov/polwaste/npdes/cso/upload/municipal_fca_framework.pdf

Technical Assistance to States

Question 1: In EPA's FY2016 Budget Request, the Agency did not request any funds for the EPA technical assistance competitive grant program. As you know, this program provides small and rural communities with the training and technical assistance necessary to improve water quality and provide safe drinking water. Many communities count on this program to assist them in complying with federal regulations when operating drinking and wastewater treatment facilities. These communities believe that is the most effective program to aid in compliance with the requirements of both the Clean Water Act and the Safe Drinking Water Act. In the past Congress has agreed and from FY2013 - FY2015 appropriated $12.7 million for the program. Given its success and importance to so many communities across the country, why is EPA is not requesting any funds to support this grant program in FY 2016?

Answer: Assisting small and rural communities in compliance with water regulations is very much a priority for this Administration. The EPA's FY 2016 budget requests $1.186 billion for the Drinking Water State Revolving Fund (DWSRF) program, which can be used to provide special assistance to systems serving 10,000 or fewer customers. For example, States are required to provide a minimum of 15% of the funds available for loan assistance to small systems to help address infrastructure needs. The DWSRF also allows states a 2% small system technical assistance set-aside to provide assistance to small and rural water systems. The 2% DWSRF set-aside is used by nearly every state to support their small systems and several states use these funds for non-profit state affiliates.

In FY 2016, the EPA is also requesting additional resources as part of the agency's infrastructure investment which will enable states to augment their roles and participation in building small drinking water system capabilities and partnerships. For example, an additional $9 million is requested to expand upon existing technical, managerial, and financial capability programs, and develop additional tools and partnerships to promote sound asset management, as well as strengthen state resources to engage in these activities. In addition, a $9 million increase is requested to provide technical assistance for small systems to plan and facilitate partnership, regionalization, or consolidation agreements. The EPA also is requesting an increase of $7.7 million in the Public Water System Supervision funding in order to enhance state and tribal efforts to provide increased operator training and technical assistance to small communities so they can acquire the knowledge and expertise needed to properly operate drinking water systems and therefore protect public health.

Question 2: You have requested $46 million and 13 new FTES for an unauthorized program to improve climate resilience for water and wastewater facilities. In contrast, you have requested only $5 million for FY 2016 out of the EPM account to set up the implementing the newly authorized Water Infrastructure Finance and Innovation Authority (WIFIA), but no money

out of the STAG account to actually implement it. How can you explain the disparities in these requests? What does this say about your priorities?

Answer: The $46 million and additional FTEs identified in the President's FY16 budget, along with requests for the State Revolving Fund programs and preparation for WIFIA, reflect a priority to invest in our nation's infrastructure. Activities within the $46 million include:

- Water Infrastructure and Resilience Finance Center – Assist communities across the country improve their wastewater, drinking water, and stormwater systems, particularly through innovative financing and by building resilience to extreme weather events.
- Capacity Building – Expand upon existing technical, managerial, and financial capability programs, and develop additional tools and partnerships to promote sound asset management.
- Integrated Planning – Expand community assistance in developing integrated plans, and to provide support for a limited number of implementation projects.
- Small System Partnerships – Provide technical assistance for small systems to plan and facilitate partnerships, regionalization, or consolidation agreements. Disseminate best practices or model partnership efforts by states and towns.
- Full Cost Pricing – Provide technical assistance to communities on the adoption of pricing structures that cover a system's full capital and operations and maintenance costs.

Also, the Administration's request for continued WIFIA start-up efforts in FY 2016 will lay the groundwork for a WIFIA program that would provide additional infrastructure assistance.

New Definition of Flood Plain

Question: On January 30, 2015, the President signed a new Executive Order (EO 13690) that changed the existing flood plain management policy that has been in effect since 1977. With these changes, the policy applies to all agencies and all federal actions and flood plain is now defined as either the 500 year flood plain or a larger area based on climate modeling.

- Will this new definition affect the projects that states can fund using the State Revolving Loan Funds?
- Will this new definition affect the type, size, or location of infrastructure that EPA requires cities to build to treat wastewater or to address sewer overflows under enforcement agreements?
- Will this new definition affect the conditions attached to municipal stormwater permits?
- What was EPA's involvement in developing this Executive Order?
- What outreach efforts were made before signing this Executive Order to state and local governments?

Answer: Executive Order 13690 (EO 13690), which amended Executive Order 11988 on Floodplain Management, gives agencies flexibility to select one of three approaches for establishing the flood elevation and hazard area they use in siting, design, and construction. First, agencies may use the elevation and flood hazard area that result from freeboard of 2 or 3 feet, depending on criticality. Second, agencies may also use the elevation and flood hazard area that result from a climate-informed science approach. Finally, agencies may use the area subject to flooding by the 0.2 percent annual chance flood. EO 13690 does not define the flood plain as "either the 500 year flood plain or a larger area based on climate modeling."

Following the development and issuance of the Final Revised Guidelines for EO 13690, which the public comment period recently closed (May 6), the EPA will begin the process for implementing EO 13690. Until that process is complete, it would be premature to respond to questions regarding effects on programs or projects.

The EPA participated in the interagency group that assisted in the development of the Executive Order and Draft Revised Guidelines. As one of the agencies in the interagency group, the EPA participated in engagement efforts with states, local governments, and other stakeholders regarding flood risk policy issues.

Stormwater

Question: EPA has announced that it has abandoned its plans to develop a national storm water rule making that would have tried to expand your authority to regulate not only pollutants, but also the actual flow of water. That is not surprising given the fact that courts have made it clear that the Clean Water Act does not give EPA any authority to regulate water flows. However, it is my understanding that your agency is continuing to advance this agenda by regulating water flows in individual permits.

- Will you commit to me that your agency will use Clean Water Act permits to regulate the discharge of pollutants only and not the flow of water?

Answer: The EPA and the States responsible for administering the National Pollutant Discharge Elimination System (NPDES) permits will continue to review and reissue Municipal Separate Storm Sewer System (MS4) permits under the authorities governing stormwater discharges in Section 402(p) of the Clean Water Act (CWA).

Attorneys/Workforce

Question 1: Administrator McCarthy, the President's budget request seeks an additional $10 million that would go to hire almost 40 additional attorneys to work at EPA. More than $3.5 million would go to hire 20 new attorneys who would be devoted to supporting the Clean Power Plan alone.

At a House committee hearing last week, you stated that these attorneys would not be "litigation attorneys" and instead would be used to help with reviewing permits and assisting states to set up their programs.

However, your own budget justification says these additional attorneys and needed because, "In addition, each EPA action is expected to be challenged in court, which will require skilled and experienced attorneys specialized in the Clean Air Act to devote significant resources to defense of these action."

- Which is it? Do you stand behind your recent statement to Congress, meaning the budget justification is incorrect? Or do you agree that you need to hire additional attorneys in part to defend these unlawful rules in court?

Answer: The FY 2016 President's budget requests 19.5 additional employees for legal counseling on a wide variety of EPA issues and 20 employees specifically for Clean Power Plan implementation. All of these additional employees would be provided to the EPA's Office of General Counsel for use in both EPA headquarters and the regional offices. Lawyers in the Office of General Counsel work closely with EPA program offices on rule development and implementation. They also review permits, counsel on state implementation plans and help address stakeholder concerns and questions. As such, with these employees, the EPA would provide significant benefits to our partners, stakeholders, and regulated communities.

Assisting the Department of Justice in defending the agency's actions is an important role for lawyers in the EPA's Office of General Counsel. Our lawyers have deep expertise in specific areas of law, and advise on all agency activities within that area of expertise. Most of the EPA's significant rules are challenged in court; often the regulated industry and environmental plaintiffs both challenge the same rule. It is in the interest of all stakeholders if the agency can get the rule right the first time, providing a robust explanation and record. This means a better final rule and less uncertainty.

The additional Clean Power Plan focused legal employees will work on the full range of important legal counseling services provided by the Office of General Counsel, including rule development, assisting the Department of Justice in defense, reviewing permits, and counseling on state implementation plans.

Question 2: The Budget justification goes on to say that additional legal resources will make EPA more responsive to states, industry, and citizens, and will make EPA's actions more defensible in court. Yet the budget request also says there are no performance measures for the agency's attorneys like there are for other programs.

- Why is that?
- Does this lack of staffing or accountability explain why, when it issued performance standards for new sources in September 2013, EPA seemed unaware of the Energy Power Act provision that prohibits the use of carbon capture projects receiving certain

federal funding from being used to show the technology had been adequately demonstrated?

- Shouldn't EPA attorneys and staff in the Air office have known about that provision before the rule was proposed?
- How are you going to ensure that these additional legal resources will be used effectively?
- Would these be term-limited positions, or permanent hires?
- Do the agency's attorneys – or any employees for that matter – keep track of their time, like attorneys in the private sector do or workers at a coal mine or factory would?
- Given the issues EPA has had with time and attendance problems, what is EPA doing to ensure that EPA staff are in fact doing the jobs they are being paid to do?

Answer: The Office of General Counsel supports each of the agency's programs in achieving their goals and priorities. As such, OGC supports the accomplishment of the performance measures for every agency program. The additional legal counseling FTE in the President's proposal would result in the agency's ability to hire additional permanent attorneys in fiscal year 2016. These new attorneys would allow the agency to better serve our co-regulators and other stakeholders.

While OGC itself does not have quantitative measures, it has a very structured and systematic approach to its work. Each law office has a weekly or bi-weekly meeting to report to the General Counsel, and each office carefully tracks the cases and associated deadlines in its area of law. Each law office is similarly in close contact with the relevant media office, getting real-time feedback on both that office's needs and OGC lawyers' performance.

The EPA's September 2013 Proposed Carbon Pollution Standard for New Power Plants[1] does not raise any accountability concerns. Any final standards the EPA issues will be based on sound science and will undergo thorough legal review to ensure they comply with all applicable laws and regulations. The EPA does not believe that the Energy Policy Act of 2005 precludes consideration of the projects the EPA has evaluated. The EPA has issued a Notice of Data Availability (NODA) that notes the availability of a Technical Support Document (TSD) in the rulemaking docket that details its proposed position on this issue. It explains, "EPA interprets these provisions to preclude EPA from relying solely on the experience of facilities that received EPAct05 assistance, but not to preclude EPA from relying on the experience of such facilities in conjunction with other information." The EPA based its proposed determination on a number of projects and other information including projects that did not receive any assistance under EPAct05. In addition, the agency extended the public comment period for January 2014 proposal by 60 days to allow adequate time for the public to review and comment on the contents of the NODA and TSD.

[1] For more information: http://www2.epa.gov/carbon-pollution-standards/2013-proposed-carbon-pollution-standard-new-power-plants

OGC uses a tracking system primarily to assist with workload management, to help ensure that all deadlines are met. In addition to this close tracking of substantive work, judicial deadlines, and client satisfaction, the time and attendance of OGC employees are subject to all agency accountability measures for time and attendance. Updated agencywide internal controls were implemented on September 21, 2014 to ensure compliance with time and attendance policies and regulations. The EPA made system adjustments to ensure accurate time and attendance recording, including elimination of default pay and mass approvals. The EPA established requirements for supervisors to monitor time and attendance reports, and clarified the time and attendance approvals of senior executives through an executive approval framework.

Question 3: Please describe the process and resources the Agency (both Headquarters and Regional Offices) currently uses to track litigation to which it is a party, as well as deadlines for regulatory or other EPA action that have been established in litigation settlements or court orders.

- What efforts are planned in FY 2016 to improve this process and the public transparency of this tracking?
- What public notice and opportunity for comment and public participation does the Agency give to the public when a deadline established in a settlement or court order is revised or extended?

Answer: The process the agency uses to track litigation starts with assigning the litigation to an attorney. The attorney assigned along with counsel from the Department of Justice, is responsible for tracking the litigation, and any associated deadlines or court-ordered schedules. As major deadlines or events approach, these are brought to the attention of the General Counsel through weekly or bi-weekly meetings. Where the agency agrees in settlement to a deadline for agency action, that deadline becomes a commitment of the relevant program office.

For both litigation and regulatory actions, there are a number of ways that agency provides information to the public. Below are examples of how information regarding litigation and regulatory actions are made available:

- Each Notice of Intent (NOI) to sue the EPA under an environmental statute is posted here: http://epa.gov/ogc/noi.html. (In response to stakeholder requests, the EPA has also begun posting complaints next to the related NOI.)
- When the EPA receives a petition for rulemaking, those are posted here: http://www2.epa.gov/aboutepa/petitions-rulemaking.
- The EPA publishes in the Federal Register any proposed settlement agreement under the Clean Air Act before finalizing. There is a 30-day open comment period on each of these proposed settlements. You can see an example here: https://federalregister.gov/a/01-21342.
- Regulatory agendas are available in a few different ways, as explained on the agency's website. Available here: http://www2.epa.gov/laws-regulations/regulatory-agendas-and-regulatory-plans.
- The searchable regulatory plan is available at: http://www.reginfo.gov/public/do/eAgendaSimpleSearch. (These entries include

deadlines such as those agreed to through settlement; for an example search RIN 2060-AM08).

Question 5: For its FY2015 budget proposal, EPA requested to remove the 50 person ceiling for hiring under Title 42. A March 5, 2015, EPA Inspector General Report found that EPA's Office of Research and Development did not always demonstrate the need to use Title 42 to recruit or retain 19 positions reviewed. In four cases reviewed, the IG found that employees were converted to Title 42 to perform the same position, yet paid a total $47,264 more in salary for performing the same job. The EPA OIG recommended that EPA improve transparency and its justification for the use of Title 42 appointments or reappointments, which could result in potential monetary benefits of $3.5 million. EPA did not agree with the OIG's recommendation. The OIG responded that EPA's alternate approach does not address the need to justify the need to use Title 42 authority or the need for more transparency in the decisions to use the Title 42 authority.

- Why did EPA request to remove the 50 person ceiling under Title 42 for FY2015 and not for FY2016?
- Why did EPA disagree with the OIG's recommendations?
- How will the EPA address the need for greater transparency and justification for Title 42 hiring?

Answer: 1) As a result of Congressional action in FY 2015, the Administration chose to not request any additional changes to its Title 42 authority in the FY 2016 President's Budget at this time. It should be noted that as recently as 2014, the National Academy of Sciences strongly supported EPA's use of the Title 42 authority.

2) EPA's Office of Research and Development (ORD) and the Office of Inspector General (OIG) reached an agreement on the corrective actions to be taken and EPA has completed these actions. The OIG has officially closed this audit. The OIG report found that ORD has a rigorous, in-depth process for hiring high-quality scientists and science leaders under its Title 42 authority. The Report found no instances of impropriety or mismanagement by EPA of its Title 42 authority and acknowledged ORD had detailed implementation guidance in place. The OIG also noted that EPA has undergone other favorable evaluations, such as a 2012 Government Accountability Office audit of EPA's Title 42 authority.

Further, the OIG report highlighted ORD's statements that Title 42 "allows the agency to maintain workforce flexibility and critical expertise in the face of emerging and rapidly changing scientific and technological approaches. The science leaders that ORD has recruited and retained using Title 42 are world-renowned experts in their field and are leading cutting-edge research programs in ORD to address the environmental issues of the 21st Century." ORD agreed to address the one OIG procedural recommendation contained in the report, which focused solely on perceptions of transparency.

3) To address the one OIG report recommendation, ORD revised its Title 42 Operations Manual to increase the transparency of ORD's justification to use Title 42 authority. The ORD Title 42 Operations Manual has been updated to reflect ORD's periodic reporting and use of Title 42 recruitment request memorandum. The OIG has now closed this audit.

Homeland Security

Question 1: Administrator McCarthy, President Obama recently said that terrorism is less of a threat to the American people than climate change. Do you agree?

Answer: Climate change and acts of terrorism are both issues of serious concern to the EPA. The EPA's homeland security budget helps the EPA to address important requirements that are intended to prepare the EPA to respond to and promote recovery from significant emergencies, including acts of terrorism and natural disasters.

Question 2. Does the President's thinking explain why EPA's budget request has cut homeland security related funding in several important areas?

For example, the budget would cut more than $1 million from the Science and Technology account for work to treat contamination from chemical and radiological incidents (Page 131). The budget would also cut more than $2.5 million from the Superfund account reducing EPA's ability to detect threats and test and decontaminate sites.

- Why is EPA cutting back its capability to detect and respond to biological or radiological attacks?

Answer: The EPA is maintaining its capability to detect and respond to biological or radiological attacks. Over the past years, the EPA has built, developed, and now maintains agency Homeland Security assets that provide critical technical expertise and support during nationally significant incidents including those which can involve chemical, biological, radiological, and nuclear (CBRN) agents. EPA also continues to provide support in addressing the science and technology needs for response to and recovery from biological and radiological incidents.

The reductions to the Solid Waste & Emergency Response program will not impact the agency's ability to respond to incidents. The reductions may affect field equipment maintenance and upgrades, such as planned upgrades to the Portable High-Throughput Integrated Laboratory Identification System (PHILIS) units. Additionally, there may be reduced agency participation in large-scale exercises that support internal and external coordination on federal roles and responsibilities. The EPA will continue its coordination and integration efforts and its increased leverage of resources with our federal partners to enable the EPA to meet its baseline requirements on Homeland Security Presidential Directives and Homeland Security mandates by following an all-hazards approach with emphasis on the most pressing capability gaps.

The FY 2016 EPA's President's Budget request of $21.1 million for the Homeland Security Research Program (HSRP) will allow the agency to continue to conduct research that supports the agency in characterization of biological and radiological contamination and decontamination of indoor and outdoor areas as well as the management of the resulting waste during response to these incidents.

In addition, the President's FY 2016 Budget requests increased funding for some of the needed operability upgrades to our radiation air monitoring system, RadNet.

Question 3: The budget for emergency preparedness is essentially stagnant (only a slight $200,000 increase due to higher fixed cost for rent and staff salaries).

- What does this mean in practice – fewer air monitoring flights, slower response times, increased risks to human health and the environment from a terrorist event?

Answer: The EPA will continue its role in protecting human health and the environment from risks posed by a potential terrorist event, and the FY 2016 President's budget proposal would not impact the agency's ability to respond to a terrorist event. The proposed budget for the Superfund Emergency Preparedness program adjusts resources for the National Response Team (NRT). The EPA will continue to maintain its significant role in the NRT, but will reduce contractor support for NRT committees and subcommittees.

Question 4: Recent scandals suggest that EPA has a "culture of complacency" among some supervisors and managers when it comes to time and attendance problems, computer usage, and property management.

- Given these concerns – and ongoing work by the Office of Inspector General – I am troubled to see the low priority that EPA places on screening job applicants and making sure its employees have been vetted and are suitable for their positions of trust.
- For example, the homeland security budget for conducting background checks for employees and contractors would be cut by $340,000 – even though the John Beale episode has highlighted the need for improved background checks. Do you think this is the time for EPA to be cutting back on its process for doing background checks?

Answer: The EPA continues to perform background investigations in accordance with the Office of Personnel and Management (OPM) guidelines. There are no planned resource cuts to background investigations for FY 2016. The reduction cited in the question reflects savings associated with other work in the Homeland Security: Protection of EPA Personnel and Infrastructure program. More specifically, the reduction reflects savings associated with transitioning the EPA Personnel Access and Security System (EPASS) from development into a state of operation and maintenance. EPASS manages the enrollment, printing, issuance, and lifecycle of Personal Identity Verification (PIV) credentials as required by Homeland Security Presidential Directive 12 (HSPD-12).

Question 5: The IG has also raised concerns about the Office of Homeland Security and its interference with the IG's law enforcement work.

- How will this be resolved so it does not become a distraction to the Agency and impede EPA's homeland security mission?

Answer: Over the past few months, the Office of Homeland Security (OHS) has worked collaboratively with the Office of Inspector General (OIG) to ensure that EPA's homeland security mission is strengthened through timely information sharing and threat management. OHS also has established a process for providing the OIG with access to any external law enforcement entity that requests assistance from OHS for EPA related counterintelligence or counterterrorism investigative activities. This process ensures that there continues to be no impediment to the OIG's ability to pursue any law enforcement actions or activities that fall within their jurisdiction.

GAO Reports

Question 1: The Government Accountability Office issued a report last year on problems with how EPA analyzes its regulations for economic impact, less burdensome alternatives, and uncertainties. GAO found that EPA's regulatory impact analysis (RIAs) do not clearly identify the costs of EPA's rules and the data EPA used in its analyses were often out of date and irrelevant.

For example, GAO found that for several high-profile clean air and water rules, EPA relied on employment data that was between 20 and 30 years old and from only four industrial sectors. The GAO report states, "Without additional information and improvements in its approach for estimating employment effects, EPA's RIAs may be limited in their usefulness for helping decision makers and the public understand the potential effects of the agency's regulations on employment."

That's a big problem – that EPA is making these incredibly significant regulatory decisions – and the American public, Congress, and even EPA itself do not know what the economic impacts or potential job losses will be.

- Is EPA continuing to rely on the outdated and limited employment data when analyzing the potential job impacts of its rules? If not, what is EPA relying on?
- How much of EPA's budget request will be going toward improving and updating the employment data that EPA uses in its economic analysis documents?

Answer: The EPA no longer uses the data and study critically reviewed by GAO. Given the dearth of studies and models, the EPA does not use the same approach for employment analysis for every rule. As with other analyses in our RIAs, each employment analysis is tailored to the specifics of that regulation and reflects the degree to which reliable tools and data are available to quantify impacts. When conducting such analysis the EPA uses the best tools and data available for the relevant rulemaking. Often times, EPA conducts original "bottom up" studies that examine the employment used in specific industries and in the manufacturing and operation of pollution abatement equipment. In some cases, the EPA focuses on a qualitative discussion of the employment impacts both positive and negative and in other cases, it quantifies selected employment impacts. As the GAO acknowledges, the agency strives in all instances to transparently describe the strengths and weaknesses of the approach chosen by the agency. The EPA believes that these analyses, whether qualitative or quantitative, provide decision-makers and the public with valuable information on the employment impacts of its rules and has worked hard to refine these analyses over time.

GAO's discussion of employment impact analysis focuses on one particular study that the EPA used to quantify employment effects in two of the seven rules reviewed by the GAO. It is important to recognize that this published study represented the best available peer-reviewed research at the time these RIA's were conducted and that GAO reported that the EPA's treatment transparently recognized the limitations of the study where it was applied. The EPA recognizes that there are limited tools provided in the peer-reviewed economics literature to quantify the small shifts in employment that might be attributable to environmental regulation and is continually working to improve our approaches.

It is difficult to assess how much of the budget request the EPA will be using to improve and update the employment data in our economic analysis documents. Partly this is because economists throughout the agency conduct employment analyses and use the best data available for their particular rules. In addition, analysis of employment impacts is one part of a broader analytic effort conducted for agency rules, so it is hard to isolate the costs of one aspect of the regulatory analyses.

The EPA is exploring alternative approaches in the relevant theoretical and empirical economics literature to apply new modeling approaches to quantify employment impacts. In October 2012, the agency convened a scientific workshop with academic economists to examine the theory and methods for understanding employment effects of environmental regulation. The EPA is in the process of updating its Guidelines for Preparing Economic Analyses to include revised guidance on assessing employment impacts from regulation. Finally, the EPA has announced the formation of a new Science Advisory Board panel to advise the agency on how best to model the economic impacts of environmental regulation, including approaches to capture employment effects. This panel plans to convene this summer. Commenters also are invited to provide information and data relevant to employment analysis during the notice and comment periods on rulemakings.

Question 2: The GAO report also found that EPA had cut corners in its economic analysis due to the short time frames it had for issuing rules pursuant to court-ordered deadlines and litigation settlements.

- What criteria does EPA use when agreeing to a rulemaking deadline in a litigation settlement?
- How does EPA's obligation to conduct a robust analysis of a rule's economic impact factor into these court-ordered deadlines, or does it get short shrift in the discussions?
- Is part of the problem that laws like the Clean Air Act have unreasonable deadlines?
- Would you support attempts to give EPA additional time under the law to issue rules or update standards every 5 or 8 years as currently may be the case?

Answer: Generally, EPA and the Department of Justice (DOJ) seek to settle cases brought against EPA if we believe the litigation risk is high and there is a resolution consistent with EPA authorities and in the public interest. The factors considered in determining whether to settle a particular matter include: the legal risks presented by the case, including both the probability and possible consequences of an adverse decision; and the comparative public policy implications of litigation versus settlement, including the resources required to litigate versus to take those actions

called for by a settlement. These factors are applied in an evenhanded manner, without regard to the identity or type of the plaintiff or petitioner in the case.

The environmental statutes as enacted by Congress provide a myriad of regulatory actions that the EPA must take by certain deadlines. These requirements are commonly referred to as "mandatory duties" and the cases brought against the EPA alleging the Agency has failed to fulfill such duties are commonly referred to as "mandatory duty suits." Where the "mandatory duty" allegations are strongly grounded in statutory text, the EPA's litigating position is generally weaker, which impacts how the agency evaluates its settlement options.

While the decision to seek settlement is generally made jointly, DOJ typically takes the lead for the United States government in the development of a settlement strategy and in negotiating the settlement terms, and for EPA settlements, DOJ's Environment and Natural Resources Division must approve the decision to enter into a settlement agreement or consent decree.

In taking any action, the EPA is guided by applicable legal standards and requirements, as well as the relevant science and analysis. In mandatory duty lawsuits, seeking settlement allows the agency to negotiate for more time than it would expect to receive through litigation. Litigating these cases can be expensive litigation and result in a court-ordered schedule requiring agency action on an unfeasible timeline. By negotiating for an achievable deadline, the agency is able to invest more time in the analysis and decision-making process.

The majority of environmental lawsuits against the EPA are brought under the Clean Air Act. The Clean Air Act does have many mandatory duties with associated deadlines, which are the source of many of the cases we settle. However, before settling these cases, the proposed settlement agreement containing any deadlines goes out for public comment. Under Clean Air Act section 113(g), before finalizing a settlement agreement under the Clean Air Act or asking a court to enter a Clean Air Act consent decree, the EPA publishes in the Federal Register a notice seeking public comment on the proposed agreement and then considers any comments received.

The EPA has many duties and authorities under the various environmental statutes it administers. The agency works to protect human health and the environment by focusing on critical priorities while also endeavoring to meet recurring statutory obligations.

Facilities

Question: Administrator McCarthy, EPA's budget justification says EPA is continuing to recalculate its facility and rent needs. It says that EPA plans to spend $1 million from the Science and Technology account to study further consolidation (Page 140) and that EPA intends to save $9.5 million from the EPM account from these efforts (Page 427).

- What plans if any does EPA have to close or relocate program, regional or lab offices or spaces across the country in FY 2016? When will affected offices be informed of their closure? Will the affected employees be given the opportunity to relocate or transfer to another duty station?

- How much has EPA spent in FY 2014 and 2015 to relocate employees? How much does it expect to spend on relocation expenses in FY 2016?

Answer: In EPA's FY 2016 budget request, the agency requested $10 million to consolidate the Willamette Research Station and the Region 8 laboratory. Employees at the Willamette Research Station and the Region 8 laboratory have been informed of the agency's FY 2016 request to consolidate their space. Neither consolidation requires employee relocation. The work being conducted at the Willamette Research Station will be moved to the Western Ecology Division's main facility in Corvallis. Employees from the Region 8 laboratory in Golden, CO will be moved to EPA's National Enforcement Investigations Center laboratory in nearby Lakewood, CO. In FY 2014 and FY 2015 consolidation activities were limited to office moves within local commuting areas and employee relocation was not required. In FY 2014, EPA spent $5.4 million to move the offices of approximately 500 employees from 1310 L Street to the agency's Federal Triangle Campus in Washington, DC. In FY 2015, the agency spent $196.4 thousand in employee relocation expenses associated with facility consolidation. The agency does not anticipate using additional resources for the remainder of FY 2015 to move employees into new facilities.

Superfund/Hazardous Waste

Question 1: The FY 2016 budget shifts EPA's emphasis from well-established programs approved by Congress to ones that advance the President's Climate Action Plan.

- For example, the budget would cut almost $1 million and 5 FTEs from its RCRA corrective action program, which will reduce "EPA's technical support to state partners and may reduce the pace of cleanups including site-wide 'RCRA remedy construction' determinations." How will this reduction impact EPA's implementation of recommendations in the Government Accountability Office's 2011 report concerning RCRA corrective actions?
- How will EPA prioritize its work and support to states in response to the proposed reductions in funding?
- Will any sites or states that would have received support in order for EPA to meet its corrective action goals in the FY 2014-2018 Strategic Plan, no longer receive support due to the proposed reductions in funding?
- In another example, the FY 2016 budget request would cut funding for the RCRA waste management program by $1.3 million and more than 9 FTEs, which according to EPA's budget justification "may delay activities such as conducting additional analysis to support non-hazardous secondary materials categorical rulemakings and responding to regulatory backlog petitions." Please identify how many "regulatory backlog petitions" EPA had at the start of FY 2015 and the backlog time for each petition.
- How will this proposed reduction impact EPA's implementation of the final Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities rule, signed by EPA on December 19, 2014?

Question 2: Notably, the FY 2016 budget proposed a $2.3 million increase, including an additional 4.2 FTEs, for the Sustainable Materials Management program to implement key aspects of the President's Climate Action Plan.

- The budget justification states EPA will explore the application of Sustainable Materials Management "approach to other high priority areas." What are these areas?
- The budget justification also states that EPA plans to hire 5 FTEs to serve as "Community Resource Coordinators for climate adaptation, sustainability, and communities work" who will "work as a cross-agency, multi-media team to facilitate access to EPA's programs and resources." Please explain whether these would be permanent or term-limited positions, the professional qualifications for these positions, and from what Headquarters or regional office such positions would be based.
- The budget request proposes the creation of a $1.3 million grant program "to support the EPA's investment in climate mitigation through waste program activities to reduce greenhouse gas emissions." Please describe the statutory authority for this program, the anticipated number of grants that would be funded in FY 2016, and a summary of the criteria EPA would use for grant awards.

Question 3: Concerns remain about the slow pace of Superfund cleanups. In FY 2014, EPA achieved construction completions at only 8 Superfund sites, an all-time low, with an enacted budget for Superfund cleanups at $555 million. In FY 2016, EPA is proposing to achieve construction completions at 13 sites with a budget request of $539 million. How many additional Superfund sites would EPA be able to clean up if the $214 million that the President has requested for greenhouse gas rules were put toward the Superfund program instead?

Answers: As GAO recommended, the EPA is assessing the remaining corrective action workload, evaluating the resource needs to meet these goals, and considering revising the goals. This reduction in corrective action resources will not delay the continued assessment of remaining workload and predictions for future progress. The reduction may, in the short-term, have an impact on EPA's ability to meet our site-wide remedy construction FY 2016 and FY 2017 targets.

- The EPA will continue to work closely with states to prioritize technical assistance and work sharing for facilities or work areas where there is the greatest need, and will continue to share program efficiencies to facilitate cleanup at corrective action facilities and polychorinated biphenyls (PCB) sites.
- The FY 2016 President's Budget requested funding equal to the FY 2015 enacted level for the Hazardous Waste Financial Assistance program which provides resources to our state partners to fulfill their RCRA obligations which includes corrective action activities. The proposed reductions to the RCRA Corrective Action program will not eliminate support to any specific state or facility, but will be distributed nationwide. The funding level allows for continued, although not fully maximized, progress on cleanups.
- Since 1998, the EPA has received 15 RCRA formal rulemaking petitions and EPA has responded completely to three of these (Coal Combustion Residuals, Saccharin, and Gasification). At the start of FY 2015, the EPA has 12 "regulatory backlog petitions." Of these 12 petitions, three are actively being addressed (two for Non-Hazardous

Secondary Materials and one for Corrosivity); the others are under review. In addition, EPA receives approximately 30 – 40 "informal" requests for regulatory interpretations or assistance with specific emerging waste management situations over the course of a given year. These requests come from the regulated community, from states, citizens, and from foreign governments. Often these are complex, requiring the agency to obtain additional information about specific situations or industrial processes before being able to respond.

- The proposed reduction will not impact implementation of the final Coal Combustion Residuals Rule.

Within and outside of the federal government, the EPA has been working to reduce food loss and food waste through Sustainable Materials Management (SMM) approaches such as smarter purchasing and food donation. In addition, the residential and commercial building sector stands as an area where SMM principles can make a substantial impact with smart design choices, safer materials choices, and reuse and recycling of materials. Over the next several decades, billions of tons of concrete, steel, and wallboard will be required to construct, maintain, and operate our nation's buildings, roads and other infrastructure, resulting in substantial environmental impacts, including energy and petroleum consumption, use of non-renewable mineral resources, greenhouse gas emissions, expenditure of fresh water, and land and habitat use.

- The Community Resource Coordinator positions are intended to be permanent employees in the Regions. Each Region will receive 0.5 full-time equivalent employee dedicated to working as cross-agency, multi-media team members. The precise professional qualifications for the positions have not been finalized at this time. However, coordinators will be expected to have knowledge of and a firm grasp on sustainability concepts such as SMM, green infrastructure, smart growth, and brownfields. Further qualifications will include demonstrated experience regarding community support entities and mechanisms (i.e., the EPA's programs and other programs across the federal spectrum that impact environmental outcomes).
- The statutory authority for the proposed $1.3 million grant program is the Solid Waste Disposal Act §8001 – Research, Demonstrations, Training, and Other Activities. The EPA estimates that approximately 8-13 grants would be funded in FY 2016. These funds will focus on: increasing the recycling rates for containers and packaging; enhancing and expanding results-driven programs; working with the public and/or private sector to provide funding to assist states and local governments and non-governmental organizations (NGOs) focused on infrastructure development and providing technical assistance to recycling programs. Support in this program area will help to create new businesses and jobs in a sector that employs 1.1 million people at approximately 56,000 establishments, generating an annual payroll of nearly $37 billion, and more than $236 billion in annual revenues. Criteria for the grant awards would potentially include support of agency recycling goals, community/stakeholder needs, feasibility of project success, project benefits (e.g., policies, tools, job creation, economic and social benefits, among others), and the ability to leverage existing initiatives and partners. The EPA also will work with additional stakeholders to ensure consistent recycling guidance, identify gaps and recycling barriers, and transfer best

practices. The reporting period for grants is anticipated to extend beyond one year, in order to measure changing recycling rates.

The Superfund Remedial program has made substantial progress in completing response work, as measured by the site-wide "construction completion" measure, though this is only one of a suite of measures used to gauge Superfund outcomes. As of the end of FY 2014, EPA had achieved construction completions at over 68 percent of the 1,706 Superfund sites on the National Priority List (NPL).

As part of the FY 2016 budget request, the President has requested an increase in the Superfund Remedial program budget of more than $38 million and an increase in the Superfund Removal budget of more than $9 million. The EPA anticipates the increase in Remedial funding will enable the agency to start remedial action at up to 10 additional EPA funded site projects. It is difficult to assess how many Superfund sites could be completed with as much as $214 million in additional funding. Partly, this is because each site is different with unique site characteristics, so that site-by-site, cleanup costs would be expected to be very different. Some sites cost in the tens to hundreds of millions of dollars to complete. In addition, to move a site to completion, site investigation and studies, and remedy selection and design must be completed before starting and completing cleanup construction.

Keystone

Question 1: Administrator McCarthy, in January of this year you stated that EPA believes current low oil prices are a short-term situation and will not affect how your Agency crafts new regulations.

- Do you still stand by that statement?
- Can you please explain to me why 3 weeks later EPA told the State Department that it should revisit its analysis of the Keystone XL pipeline with a new assumption that the current low oil prices are permanent?
- As a general rule, you ignore short-term oil prices when evaluating costs and benefits. But, politics appear to determine when you make an exception to that rule. How can you reconcile this inconsistency?

Answer: The statement regarding current oil prices was a comment on consumer automobile buying habits, and was not intended to represent the agency's regulatory development process. Administrator McCarthy also noted that she did not expect that oil prices would continue to have "extreme fluctuation[s]."

The EPA's comment letter to the Department of State did not suggest an assumption that current low oil prices would be permanent. Instead, the EPA noted that given the importance of oil prices to the Department of State's market analysis and conclusions, and the recent large declines in oil prices and the uncertainty of oil price projections, we recommend that the additional low price

scenario included in the Final EIS be given additional weight in considering potential environmental impacts of the project.

The EPA considers all relevant information when evaluating costs and benefits of its proposed regulations. With regard to our comments to the Department of State concerning the Keystone XL pipeline, the Department of State's Final Supplemental EIS identified the price of oil as a key and critical determinant of the effect of the pipeline on Canadian oil sand development and thus the environmental impacts of the project. The EPA's comments only recommended that they more fully consider the low oil price scenario when evaluating the environmental impacts of the project.

Methane

Question 1: Administrator McCarthy, the Administration has acknowledged the great benefits that we are now enjoying as a result of the natural-gas renaissance in the US. In fact, the US is now the world's largest gas producer. As this was occurring, our nation's producers have been making great strides in reducing methane emissions thanks to investments in technology allowing us to produce more natural gas in a cleaner way. In fact, today, while natural gas production has increased 37% since 1990, methane from production has gone down by 25%. I am concerned as such by your January announcement regarding methane regulation.

- Why are you targeting such a steep 45% reduction in emissions from an industry that has already reduced its emissions significantly while increasing production? Moreover, the production sector represents only *0.4 - 1.4 percent* of U.S. GHG emissions.

Question 2: In the Administration's January 14th release to reduce methane emissions from this industry, an assumption was given projecting that industry's methane emissions will be increasing by 25% - not decreasing as already shown.

- Can you explain this assumption and provide the specific data from which you've based these projections?

Question 3: Administrator McCarthy, I'm trying to understand EPA's rationale for pursuing another round of Clean Air Act regulations on natural gas production. This time the agency is directly targeting methane. I think it's important to note the industry's progress in reducing methane. Natural gas producers have reduced methane emissions by 25 percent since 1990, even as production has grown 37 percent.

A recent report by researchers at the University of Texas and the Environmental Defense Fund (EDF) found that methane emissions from the upstream portion of the supply chain are only 0.38 percent of production. That's about 10 percent lower than what the same research team found in a study released in September 2013. Studies by the National Renewable Energy Laboratory, U.N. IPCC, Massachusetts Institute of Technology, and many others reached similar conclusion: that methane emissions from natural gas production are declining, and quite low compared to other sources.

Moreover, we can't forget that methane is the main component of natural gas. Producers have every incentive to capture it and prevent leaks. The evidence I just cited shows this is exactly what they are doing.

The industry is only now implementing new source performance and MACT standards finalized in 2012, which target VOCs and sulfur dioxide, but also will help reduce methane. So Administrator, my question is: Why is EPA pursuing another round of mandates on the industry? What is the rationale for moving down this path?

Question 4: Administrator, EPA indicated it will develop new source performance standards for new and modified natural gas wells this summer. This action will be taken pursuant to Section 111(b) of the Clean Air Act, which covers new and modified sources. Some legal commentators believe that this action will provide the basis for regulations of existing wells under Section 111(d). What is EPA's legal view on this point? Once you finalize regulations under 111(b), are regulations for existing wells inevitable under 111(d)? Is EPA planning or thinking about regulation existing wells under 111(d)?

Answer: Methane, the key constituent of natural gas, is a potent greenhouse gas with a global warming potential more than 25 times greater than that of carbon dioxide. Nearly 30 percent of methane emissions in the U.S. in 2012 came from oil production and the production, processing, transmission and distribution of natural gas. While methane emissions from the oil and gas industry have declined by more than 10 percent since 1990, they are projected to increase significantly over the next decade if additional steps are not taken to reduce emissions from this rapidly growing industry. EPA's strategy, which will use both voluntary and regulatory approaches, will help avoid this anticipated increase in methane emissions from new sources.

The January 14, 2015 announcement marked the beginning of the agency's process to develop proposed standards for methane and VOC emissions for new and modified sources in the oil and gas sector. As is the case with all of our regulatory actions, EPA will develop a robust regulatory impact analysis that will include, among other issues, a rigorous analysis of projected future emissions from this sector that would be avoided by the implementation of the proposed standards. To ensure the agency's projections are based on the very best data available, EPA's analysis will take into account additional information from industry, states, and other stakeholders and will follow the time-tested methodologies used in all of our regulatory impact analyses. The agency's analysis will be issued along with a proposal this summer and will be available for public review and comment.

Methane emissions accounted for nearly 10 percent of U.S. greenhouse gas emissions in 2012, of which nearly 30 percent came from the production transmission and distribution of oil and natural gas. Emissions from the oil and gas sector are down 16 percent since 1990 and current data show significant reductions from certain parts of the sector, notably well completions. Nevertheless, emissions from the oil and gas sector are projected to rise more than 25 percent by 2025 without additional steps to lower them. For these reasons, a strategy for cutting methane emissions from the oil and gas sector is an important component of efforts to address climate change.

The steps announced are also a sound economic and public health strategy because reducing methane emissions means capturing valuable fuel that is otherwise wasted and reducing other harmful pollutants – a win for public health and the economy. Achieving the Administration's goal would save up to 180 billion cubic feet of natural gas in 2025, enough to heat more than 2 million homes for a year and continue to support businesses that manufacture and sell cost-effective technologies to identify, quantify, and reduce methane emissions.

On January 14, 2015, the EPA announced plans to set standards under 111(b) to address methane and VOC emissions from new and modified sources, develop new guidelines to assist states in reducing ozone-forming pollutants from existing oil and gas systems in areas that do not meet the ozone health standard and in states in the Ozone Transport Region, and work collaboratively with key stakeholders to make progress on voluntary efforts to reduce emissions from existing sources.

Environmental Education

Question: For its FY2015 budget proposal, EPA requested zero funds for its environmental education program; yet its FY2016 budget proposal requests funds albeit an increase in funds from $8.7 million enacted in FY2015 to $10.969 million.

- Why did EPA, after requesting zero funds for the program over the last couple years, request funds and an increase in funding for the program?
- EPA has recently identified climate change as a priority for environmental education grants under this program. These grants are used to educate elementary and secondary school students, train teachers, purchase textbooks, and develop curricula based on environmental issues EPA identifies as a priority. What performance measures are in place to ensure such curricula is based on the best available science?

Answer: The recent establishment of the Office of Public Engagement and Environmental Education (OPEEE) with a career deputy to lead OEE is designed to provide leadership, management stability, and forward-thinking strategy to establish and implement a consistent vision for environmental education (EE) across the agency. Ensuring a centralized approach to EE and partnering the public engagement and EE functions within OA is intended to help EPA:

- place greater emphasis on EE as a tool for advancing priorities by providing leadership, technical expertise and coordination of agency efforts;
- enable EE to be more effectively and consistently used by the EPA's programs; and
- broaden the reach and scope of EE (through greater public engagement).

Reinstating the EE program project in FY 2016 is a visible commitment to enhancing the agency's leadership role in educating and informing the public and encouraging environmentally beneficial attitudes and actions. A centralized EE program will allow the EPA to:

- improve internal EE capacity within program offices through greater provision of OEE expertise;

- support the National Environmental Education Foundation (NEEF) and other stakeholders to leverage their resources for greater stakeholder reach; and
- avoid significant administrative complexities associated with awarding grants under multiple authorities (under a decentralized approach) and ensure grants monitoring and compliance

This program has requested in FY 2016 an increase to help meet the required staffing levels and corresponding funding requirements under the National Environmental Education Act. The request also reflects increased support for administration of EE grants; advancement of the frameworks and tools used for measuring EE impacts; development of a process to identify and address gaps and redundancies in EE materials and programming within the agency; leveraging of EE efforts across the federal government; and development of the longer-term strategic direction for the program.

In order to be eligible for a grant under the EPA's Environmental Education (EE) Grant program, proposals must address at least one of the EPA's environmental themes and at least one EPA educational priority. The EE Grant Program does not assign order of importance or preference to those themes. According to the National Environmental Education Act (NEEA), grant funds can be used to support development and dissemination of curricula, educational materials, and training programs for teachers, plus the education of elementary and secondary students and other interested groups, including senior Americans in both formal and non-formal educational settings.

The annual grants are awarded through a competitive process, and applicable federal guidelines and policies are followed for grant solicitations, proposal evaluation, and grant awards. The solicitations for EE grants includes a requirement that grantees collect and report applicable data as a condition to accepting a grant. Grantees are also required to submit a logic model with their initial proposal to identify short-, medium- and long-term educational and environmental outputs and outcomes of the project(s). As a further condition of eligibility, grantees must describe how they will evaluate the success in achieving the proposed project results and must submit a completed evaluation on the project's performance at the end of the project. In the application as well as in their progress reports, they must demonstrate the educational component of their program, including the best available science upon which it is based. By law, post-award baseline monitoring must be conducted on every EE grant, and at least every 6 months all grantees are required to report on the progress, accomplishments, and funding associated with the project.

Uranium and Thorium Mill Tailings - Rulemaking

Question 1: In January, the U.S. Environmental Protection Agency proposed "Health and Environmental Standards for Uranium and Thorium Mill Tailings (80 Fed. Reg. 4156). The agency maintains the rulemaking is necessary to reduce the risk of undetected excursions of pollutants from in situ uranium recovery operations into adjacent aquifers.

- Does the agency have any evidence that these operations have adversely impacted an adjacent aquifer? If so, please provide such data.

- Please explain why no such data is included in the rulemaking docket.
- If EPA has no such data, please explain the basis for proceeding with this rulemaking.

Answer: The EPA, as well as the general public, have access to NRC data on ISR facilities. More information concerning in-situ recovery (ISR) wellfield baseline and restoration ground water quality data collected from the NRC licensed ISR sites for regulatory purposes can be found at http://www.nrc.gov/info-finder/materials/uranium/. Generally the data is current through 2013 and shows both excursions and in at least one case, stability monitoring for as long as 10 years.

The current requirements at 40 CFR Part 192 address conventional uranium facilities but do not specifically address ISR operations. ISR operations are now the most common method for extracting uranium. In order to understand some of the reasons the EPA proposed the rule, it is helpful to understand the history related to ISR licensing and regulation. In 2006, after years of implementing the general requirements in 40 CFR Part 192 at ISR facilities, NRC said that the "manner of regulation [of ISR facilities] is both complex and unmanageable" and has led to an "inconsistent and ineffective regulatory program [for these types of facilities]." In 2007, NRC began developing new rules to address the issues at ISR facilities but stopped because the Atomic Energy Act (AEA), as amended by the Uranium Mill Tailings Radiation Control Act (UMTRCA), requires that the EPA promulgate generally applicable standards, which are then implemented and enforced by NRC.

In past and present efforts to implement the general requirements in 40 CFR Part 192 at ISR facilities, requirements vary from site to site rather than following a consistent, national approach for all ISR facilities. The proposal presents health or environmental standards tailored specifically to address the technologies and challenges associated with the most widely-used method of uranium recovery.

The proposed standards will regulate byproduct materials produced by uranium ISR, with a primary focus on groundwater protection, restoration and stability. The proposed rule will reduce the risk of undetected excursions of pollutants into adjacent aquifers. This in turn will reduce the human health risks that could result from exposures to radionuclides in well water used for drinking or agriculture in areas located down-gradient from an ISR In addition to avoiding human health impacts, the proposed rule has the potential to detect excursions sooner and thus enable a faster remedial response. Because plumes detected during long-term stability monitoring would be smaller, costs of remediation would be potentially much lower. The proposal would also lessen the likelihood of undocumented contamination of aquifers resulting in costly cleanup, potentially funded by the U.S. government rather than the responsible party (e.g. the ISR facility). Citizens located near these ISR operations have commented that they are concerned about these facilities and have requested that EPA finalize this proposal. The intent of the Part 192 proposal is to establish requirements that will ensure the ISR facility that disturbs the groundwater must restore that groundwater to predetermined levels and ensure that the restoration is stable before leaving the site and terminating its NRC license.

Question 2: In the cost benefit analysis accompanying the rulemaking, the agency focuses almost exclusively on the increased costs that would be imposed by the proposed rule's new

monitoring requirements, which could require facilities to conduct more than 30 additional years of groundwater monitoring. EPA fails to assess multiple other costs that would be associated with the rule, including the costs of maintaining licenses, permits, etc. for 30 years; claims maintenance fees owed to the Bureau of Land Management for facilities on public lands; costs to obtain and maintain surety for additional years; costs related to continuing leases with private surface holders; taxes; insurance; or the cost of maintaining equipment and facilities. Given the additional costs that would be imposed, it is likely that the ultimate cost would be several orders of magnitude higher than EPA calculated in their cost benefit analysis.

- Please explain why EPA chose to ignore these costs in its analysis.
- Does EPA plan to revise its cost benefit analysis to more comprehensively assess the costs of the rulemaking? If not, why not?

Answer: License fees range from $35,400 to $40,000 per year, but drop to zero if only decommissioning is occurring. Financial assurance costs continue through decommissioning, but decline as more of the site is decommissioned. Throughout the life of an ISR operation, the costs associated with licensing and financial assurance would, in EPA's assessment, be unaffected by the proposed rule, until only one wellfield is still in operation or undergoing decommissioning. The longer duration of monitoring required would cause the firms to incur the costs associated with financial assurance for a longer period of time (potentially 30 years). However, as the number of wellfields in operation declines, and the amount of radioactive material onsite declines, the magnitude of the financial assurance required would decline proportionally. EPA thus believes that the additional costs associated with payment of license fees and financial assurance would be small relative to other incremental costs and thus we did not include them in our quantitative estimate of costs and impacts.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR 2 4 2015

OFFICE OF
CIVIL RIGHTS

The Honorable James Inhofe
Chairman, Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am pleased to send you the enclosed copy of the U.S. Environmental Protection Agency's (EPA) Fiscal Year 2014 annual report prepared in accordance with Section 203 of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act), Public Law 107-174.

This report provides information regarding the number of cases arising under the respective areas of law cited in the No FEAR Act where discrimination was alleged; the amount of money required to be reimbursed by the EPA to the Judgment Fund in connection with such cases; the number of employees disciplined for discrimination, retaliation, harassment or any other infractions of any provision of law referred to under the Act; an analysis of trends and knowledge gained; and accomplishments.

An identical letter has been sent to each entity designated to receive this report as listed in Section 203 of the No FEAR Act. The U.S. Attorney General, the Chair of the U.S. Equal Employment Opportunity Commission, and the Director of the U.S. Office of Personnel Management will also be sent a copy of the report.

If you have any questions, please contact me, or your staff may contact Thea J. Williams in the EPA's Office of Congressional and Intergovernmental Relations at williams.thea@epa.gov or (202) 564-2064.

Sincerely,

Velveta Golightly-Howell
Director

Enclosure

United States Senate
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
WASHINGTON, DC 20510

March 17, 2014

The Honorable Gina McCarthy
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Re: Petition for Reconsideration of Final Rule published in the Federal Register October 15, 2012, Docket Nos. EPA-HQ-OAR-2010-0799 and NHTSA 2010-0131 (2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards)

Dear Ms. McCarthy:

Since the Alternative Motor Fuels Act of 1988, natural gas vehicles (NGVs) have been awarded incentives under federal Corporate Average Fuel Economy (CAFE) rules. However, Environmental Protection Agency's (EPA's) light-duty vehicle greenhouse gas (GHG) rules established in the above-referenced docket curtail some incentives after model year 2016. By contrast, the analogous incentives for electric vehicles (EVs) are extended through 2025, creating a bias clearly in favor of EVs over NGVs.

In 2014, I worked to pass legislation to address, *inter alia*, the minimum driving range for alternative fuel vehicles. However, in the above-referenced docket, EPA required that dual-fuel NGVs: (1) have a minimum ratio of natural gas range to gasoline range of 2.0; and (2) are designed so that gasoline can only be used when the CNG tank is empty[1] in order to take advantage of utility factor calculations in measuring greenhouse gas (GHG) emissions and CAFE. It is my understanding that VNG and NGVAmerica filed a petition for reconsideration with EPA in December 2012 urging reversal of this decision, and it is my further understanding that EPA has not taken any action on this petition.

I request a status update regarding EPA's consideration of the VNG/NGVAmerica petition and to urge a prompt decision granting the relief requested in the petition. The threshold established by EPA is contrary to the current automobile industry practice and serves no purpose other than to unnecessarily hinder the market development of NGVs. All of the dual-fuel NGVs currently available and announced for model year 2015 provide twice the range on gasoline as they do on natural gas, but still provide a minimum of 150 miles on natural gas. There is no justification for preventing these vehicles from taking advantage of the utility factor calculations in measuring greenhouse gas emissions.

[1] 77 F.R. 62624., at 62828-29, 63129-30.

Similarly, under EPA's GHG rules, both EVs and NGVs are temporarily credited as generating greater reductions in emissions than they do in the real world in order to encourage automakers to adopt these new technologies. However, EV incentives will be in effect through 2025 while NGV incentives will be phased out in 2016.

EPA justified its decision to phase out the emissions incentive for NGVs well before it phases out the incentive for EVs on the grounds that NGVs are not as much of a "game-changing" technology as EVs. In actuality, natural gas is not only a game-changer but an indispensable alternative when you consider the importance of the market for light trucks (larger vehicles such as pickups, minivans, and SUVs):

- Natural gas is the only commercially available alternative fuel for light trucks, which make up more than half the market and are increasingly popular with low gasoline prices
- EVs are limited to small cars (due to battery weight and cost), less than half of the market
- NGV emissions are already approximately 25% lower than gasoline and can be reduced further by blending with biogas and/or hydrogen

While EVs may be "game-changers" in their own right for cars, NGVs are clearly a game-changer for the light trucks that make up more than half of new vehicle sales. Light trucks account for over half of petroleum consumption and emissions and generally have lower fuel economy than cars. By allowing NGVs to continue receiving incentives, EPA will ensure that all clean fuel alternatives are developed for all types of vehicles – and not reserved for EPA's ideal small EVs.

I recognize that one of your concerns may be that consumers who purchase dual-fuel NGVs will not use the alternative fuel and will rely instead on gasoline. This concern is unfounded. This issue is a real one in the flex-fuel vehicle market; very few consumers ever run their flex-fuel vehicles on ethanol. Dual-fuel NGVs are different. Automakers do not generally charge a premium for flex-fuel vehicles compared to their gasoline-only equivalents; as such there is no ongoing financial incentive (or disincentive) to a specific fuel. Dual-fuel NGVs, however, often see upcharges ranging from $5,000 to $10,000 per vehicle – a function of the necessary equipment add-ons. Knowing this, the only economically sound reason to purchase a dual-fuel NGV is to take advantage of lower natural gas fuel prices, irrespective of the vehicle's range on that fuel. Consumers who have dual-fuel NGVs use natural gas as their primary fuel, and EPA's regulations should credit automakers accordingly.

I appreciate your attention to and prompt resolution of this matter.

Sincerely,

James M. Inhofe
Chairman

cc:
Robin Moran (EPA)
Lily B. Smith (NHTSA)
Gregory Powell (NHTSA)
James Tamm (NHTSA)
John W. Whitefoot, Ph.D. (NHTSA)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 2 1 2015

OFFICE OF
AIR AND RADIATION

The Honorable James M. Inhofe
Chairman
Environment and Public Works Committee
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for your letter of March 17, 2015, to U.S. Environmental Protection Agency Administrator Gina McCarthy, inquiring about the status of the EPA's consideration of a petition for reconsideration filed by VNG and Natural Gas Vehicles for America (NGVAmerica), regarding the compressed natural gas (CNG) vehicle provisions in the light-duty greenhouse gas (GHG) standards rulemaking for model years 2017-2025. The Administrator asked that I respond on her behalf.

VNG's petition is focused on a narrow issue regarding assumptions about how often consumers fuel with CNG compared to gasoline for dual-fuel vehicles. In the 2017 - 2025 rule, after undergoing public notice and considering public comments, the EPA established provisions to ensure that the emissions of dual-fuel CNG vehicles reflect the expected real-world usage of the two fuels. These provisions allow emissions of dual-fuel vehicles to assume a high level of CNG (e.g., 90 percent or higher) use for those vehicles achieving a CNG range that is double or more that of the gasoline range. We refer to this as the "utility-factor" based calculation, and the specific utility factor allowed for use in the vehicle emissions calculation varies based on the vehicle's CNG range. For example, a vehicle with a CNG range of 150 miles (and gasoline range of 75 miles or less) would use a compliance assumption of roughly 92 percent CNG and 8 percent gasoline (in other words, the GHG emissions when using CNG are weighted at 92 percent and the GHG emissions when using gasoline are weighted at 8 percent). Vehicles that have a CNG-to-gasoline range of less than two would use a 50 percent weighting of emissions for both CNG and gasoline. VNG's specific request in the petition is that the EPA eliminate the requirements that dual-fuel vehicles must have a CNG range double or more than that of gasoline in order to be eligible for the utility-factor approach.

The EPA is in the process of carefully reviewing the issues raised in the VNG petition. We have met with representatives of VNG several times and have had a constructive dialogue thus far. In these discussions, we have identified key data gaps that currently exist, including GHG emissions for dual-fuel vehicles running on CNG compared to gasoline and the real-world fueling experience of dual-fuel vehicles on CNG relative to gasoline. On several occasions we have asked VNG for empirical data to support their supposition that consumers driving dual-fuel CNG vehicles use natural gas nearly exclusively even when vehicle range on CNG is less than that on gasoline. Such data would enable the EPA to make an informed decision on the petition based upon the best available data and information.

Again, thank you for your letter. If you have further questions, please contact me or your staff may contact Patricia Haman in the EPA's Office of Congressional and Intergovernmental Relations at haman.partricia@epa.gov or (202) 564-2806.

Sincerely,

Janet G. McCabe
Acting Assistant Administrator

United States Senate
WASHINGTON, DC 20510

May 22, 2015

The Honorable Gina McCarthy
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Administrator McCarthy,

We write to express concerns over a report that the Environmental Protection Agency (EPA or Agency) may have conducted an unprecedented lobbying and propaganda effort on behalf of the "Waters of the United States" rulemaking.

As you know, many of the rules that are being pushed by your agency are controversial – including the rule to expand the scope of "Waters of the United States" under the Clean Water Act – and are expected to have devastating effects to the economies of many states, ours included. That's why a majority of states have demanded that the "Waters of the United States" rulemaking be retracted or substantially revised before being finalized. More than 300 groups and associations from across the country—including the American Farm Bureau Federation, the National Association of Home Builders, and the National Mining Association—are also fighting it.

However, in public testimony and in private meetings, EPA officials have consistently disregarded those concerns, and instead have sought to highlight the alleged public support for the rule. The Agency, along with many groups supporting the rule, have consistently said that it has received more than one million comments on the rule, and about 90 percent of those comments are supportive.

In fact, you testified at the Senate Environment and Public Works Committee in March, "We have received over one million comments, and 87.1 percent of those comments we have counted so far — we are only missing 4,000 — are supportive of this rule." And then for emphasis, you repeated the claim.

According to a May 19, 2015 New York Times article, the EPA embarked on unprecedented and questionable lobbying campaign to generate public comments in support of this rulemaking. EPA has used a variety of social media tools to promote the importance of the Agency's rulemaking efforts and to solicit these comments, including, but not limited to "Thunderclap" to create a "virtual flash mob," YouTube videos, and the "#CleanWaterRules" and "#DitchtheMyth" hashtags on Twitter.

A deeper look at the "one million comment" claim shows a more complicated story. According to the U.S. Army Corps of Engineers, only 20,567 of those comments are considered "unique" and of those, only 10 percent were considered substantive.

In other words, the vast majority—more than 98 percent of the comments received—appeared to be mass mailings, the majority of which were likely generated by your agency's unprecedented lobbying efforts.

All of the unique "substantive" comments were reviewed by the Corp of Engineers. It found that contrary to EPA's characterization, 39 percent of those comments are supportive of the rule, while 60 percent are opposed to it.

It is troubling that the EPA—which should be an unbiased source of information—is using taxpayer dollars to use social media for lobbying and propaganda purposes to promote the importance of this rulemaking and the Agency itself to the American public and lawmakers, in possible violation of the Anti-Lobbying Act, 18 U.S.C. § 1913, and appropriations restrictions against lobbying and propaganda. Given these facts, please provide answers to the following questions and all requested documents no later than June 5, 2015:

- Given the statements from the Army Corps of Engineers that 60 percent of substantive comments were opposed to the proposed "Waters of the United States" rule, please explain whether the statements made by EPA officials that approximately 87 percent of comments received support the rule meets the requirements of the Information Quality Act.

- Prior to undertaking your agency's unprecedented PR campaign to fight for the Waters of the U.S. rule, did you seek a legal opinion regarding the legality of this campaign from anybody in your agency or from the Department of Justice or other federal officials? If so, please include a copy of any legal opinions received by EPA counsel, the Department of Justice, or other federal officials.

- Who is the EPA official or officials responsible for approving content disseminated on Twitter, YouTube, Facebook, and other social media platforms. Please describe the internal legal and policy review processes EPA uses for approving such communications.

- What are the EPA's policies concerning the use of social media to interact with the public and to promote agency activities and rulemakings in compliance with laws prohibiting lobbying and propaganda? Please provide copies of any such policies.

- Approximately how many staff hours have been devoted towards public relations, lobbying, and propaganda efforts in support of the "Waters of the United States" rule?

- What was the cost to the taxpayers for these efforts? In estimating staff hours and costs spent on efforts, please include costs spent on contractors, for the Thunderclap for the "Waters of the United States" rule, the "Ditch the Myth" and "Clean Water Rules" campaigns, the YouTube and Twitter videos and statements designed to undermine critics of and to elicit public support for the proposed rule, including posting videos produced by the Choose Clean Water Coalition urging EPA to adopt the clean water rule.

- At a hearing on March 4, 2015, we asked you to provide the legal analysis that you used to formulate the "Waters of the United States" rulemaking. Please supply that analysis along with the answers to the above questions.

We look forward to your timely response. Please have your staff contact the Committee on Environment and Public Works at (202) 224-6176 with any questions.

Sincerely,

James M. Inhofe
Chairman, Committee on
Environment and Public Works

Dan Sullivan
Chairman, Subcommittee on Fisheries,
Water, and Wildlife

M. Michael Rounds
Chairman, Subcommittee on
Superfund, Waste Management, and
Regulatory Oversight

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 1 1 2015

The Honorable James M. Inhofe
Chairman
Committee on Environment and
Public Works
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for your May 22, 2015, letter regarding the U.S. Environmental Protection Agency's use of social media. I want to assure you that the EPA's use of social media in no way violates the Anti-Lobbying Act. Rather, the EPA's use of social media in its outreach and engagement is not unique, and is well grounded in federal law and executive branch directives. It is also appropriately supported and bounded by internal EPA guidance and policies.

The E-Government Act of 2002 recognized the importance of promoting the "use of the Internet and other information technologies to provide increased opportunities for citizen participation in Government."[1] Section 206 of that law, entitled "REGULATORY AGENCIES," lays out two purposes: to "(1) improve performance in the development and issuance of agency regulations by using information technology to increase access, accountability, and transparency; and (2) enhance public participation in Government by electronic means, consistent with requirements under…the Administrative Procedures Act."[2]

President Obama's memo on Transparency and Open Government encourages federal agencies to use new technologies to communicate with and engage with the public.[3] The Office of Management and Budget Directive that followed amplified the importance of reaching out to the public, and tasked federal agencies to "promote informed participation by the public," and "proactively use modern technology to disseminate useful information."[4]

---

[1] Pub. L. No. 347-107, 116 Stat. 2901.
[2] Pub. L. No. 347-107, 116 Stat. 2915.
[3] See *Transparency and Open Government* (Jan. 21, 2009), at: www.whitehouse.gov/the_press_office/Transparency_and_Open_Government/.
[4] See *Open Government Directive* (December 8, 2009), at: www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf.

The effective and appropriate use of social media to reach the public has been one piece of the EPA's effort to increase transparency and promote participation in rulemaking. The 2011 EPA Social Media Policy established that "it is EPA's policy to use social media where appropriate in order to meet its mission of protecting human health and the environment."[5] The agency also has extensive procedures that govern how it uses social media to communicate with the public.[6] These procedures address concerns such as privacy, security, and copyright, as well as laying out internal roles and responsibilities. The policy and procedures are attached for your information.[7]

The EPA's Office of Web Communications (OWC) is the agency lead for the use of social media in advancing the agency's mission, and OWC works with a network of communications and public affairs directors throughout the agency. OWC and these communications professionals also work closely with the EPA's Office of General Counsel (OGC) to review terms of service for individual applications and fact-specific questions as they arise. With respect to the Anti-Lobbying Act, OGC last provided general formal guidance on the requirements of that Act in 2010.[8] That internal memorandum is also attached.

As described in the EPA Social Media Policy, the EPA uses social media as one of many ways it connects with the public about important environmental issues and about the agency's ongoing work. "EPA is using social media tools to create a more effective and transparent government, to engage the public and EPA's partners, and to facilitate internal collaboration. …The benefits of using social media in support of EPA's mission include increased ability for the Agency to engage and collaborate with partners, notably the American public."[9]

The EPA can and should educate the public about the environmental challenges the EPA is working to address. The agency also regularly encourages members of the public and various stakeholder groups to participate in the agency decision-making processes. Through every communication tool available to the agency, including social media, we encourage stakeholders of all perspectives to comment in the official dockets of our proposed rules. Public comment is an essential part of the agency's rulemaking process; is legally required for many of our actions; and is always extraordinarily valuable because of the range of perspectives and information it brings to the agency's attention. Frequently, the comments we receive result in improvements to proposed actions, as demonstrated in the many changes you can see between the EPA's proposed Clean Water Rule and the EPA's final Clean Water Rule. As forecast by the proposal, which requested comment on many issues, the preamble of the final rule and detailed documents contained in the docket describe the wide array of comments received and the many material improvements that were made in response to this participation.[10]

---

[5] *EPA Social Media Policy*, Classification No. CIO 2184.0 (June 20, 2011).

[6] See *Using Social Media to Communicate with the Public*, EPA Classification No. CIO 2184.0-P02.1 (June 20, 2011).

[7] This policy and the explanations throughout this letter refer to the use of social media for official EPA purposes, not any use of social media by EPA employees in their personal capacity.

[8] See Memorandum from General Counsel Scott Fulton, *Guidance on Indirect Lobbying* (February 2, 2010).

[9] *EPA Social Media Policy*, Classification No. CIO 2184.0, at § 4 (June 20, 2011).

[10] *Clean Water Rule: Definition of "Waters of the United States"* (May 27, 2015) prepublication version available at: http://www2.epa.gov/sites/production/files/2015-06/documents/preamble_rule_web_version.pdf; Docket No. EPA-HQ-OW-2011-0880 available at: www.regulations.gov.

One of the ways the agency worked to raise awareness of the Clean Water Rule during the open comment period was through the use of a social media tool known as "Thunderclap." This is a free online tool that lets users share a message. The message is then repeated through the social media accounts of other users who choose to spread that message. In this case, the EPA shared the message "Clean water is important to me. I support EPA's efforts to protect it for my health, my family, and my community." As a result of the Thunderclap, that message was posted simultaneously to the social media accounts of the 980 people who signed up for that Thunderclap. Based on the number of connections to those accounts, Thunderclap estimates that message reached 1,803,761 people. Those who clicked on a link that traveled with the message were taken to the EPA's public website, which provided information about the proposed rule.

This outreach effort was vastly different from activities prohibited under the Anti-Lobbying Act;[11] it did not request the public to contact Congress (or any other legislative body) to support or oppose any legislation.[12] The EPA's communications were consistent with interpretations from the Department of Justice, Office of Legal Counsel, and the Comptroller General of the Government Accountability Office, which recognize the Executive Branch's right to communicate with the public about its policies and activities.[13] As the Office of Legal Counsel has explained, the Anti-Lobbying Act "does not prohibit speeches or other communications designed to inform the public generally about Administration policies and proposals or to encourage general public support for Administration positions."[14]

The "Thunderclap" outreach related to a rule proposed by the EPA. As it should, the EPA was raising awareness of its proposal, emphasizing the value of the EPA's work in this regard, and reminding people of the relationship between the EPA's work and important public health protections. "Agency officials have broad authority to educate the public on their policies and views, and this includes the authority to be persuasive in their materials."[15] And, while the Thunderclap itself did not solicit comments on the proposed Clean Water Rule, there is no prohibition against the agency soliciting comment on its own proposals during the comment period. In fact, during the comment period on the Clean Water Rule, the agency solicited comment in many venues from stakeholders of all types and perspectives all across the country, just as it does on all major rulemakings—in order to ensure a sound, implementable, and effective final rule.

While social media outreach is only a small part of the many ways the EPA communicates with the public, these applications are an increasingly common source of information for most Americans. The traditional sources of regulatory information, such as the Federal Register, are still available, but today the agency is able to more quickly and economically reach a far larger and more diverse population

---

[11] 18 U.S.C. § 1913.

[12] See *Constraints Imposed by 18 U.S.C. 1913 on Lobbying Efforts*, 13 Op. O.L.C. 300 (1989)); *Application of 18 U.S.C. 1913 to "Grass Roots Lobbying" by Union Representatives*, Office of Legal Counsel, Nov. 23, 2005; and *Consumer Product Safety Commission–Prohibitions on Grass Roots Lobbying and Publicity and Propaganda*, B-322882, U.S. Comp. Gen. (Nov. 8, 2012).

[13] See e.g., 13 OLC 300 (1989); *Department of Health and Human Services – Use of Appropriated Funds for HealthReform.gov Web site and "State your Support" Web page*, B-319075 (April 23, 2010); and *Social Security Administration–Grassroots Lobbying Allegation*, B-304715 (April 27, 2005).

[14] 13 O.L.C. 300, 306 (1989).

[15] *Department of Housing and Urban Development – Anti-Lobbying Provisions*, B-325248, U.S. Comp. Gen., Sept. 9, 2014.

through new technology tools. The agency firmly believes this is both a worthwhile and necessary endeavor—the work the EPA does to protect human health and the environment touches every American; and the information the EPA provides to explain this work should also reach every American.

Thank you again for your interest in the EPA's use of social media. We hope this letter answers your questions, and clarifies any concerns you may have had about our use of such media in communicating with the public. If you desire further information in connection with this request, we would be glad to discuss this further, and EPA staff will work with your staff to figure out how best to accommodate any such interest. If you have additional questions, please contact me, or your staff may contact Tom Dickerson in the EPA's Office of Congressional and Intergovernmental Relations at dickerson.tom@epa.gov or (202) 564-3638.

Sincerely,

Thomas Reynolds
Associate Administrator
Office of Public Affairs

Enclosures

1. EPA Social Media Policy, Classification No. CIO 2184.0 (June 20, 2011).
2. Using Social Media to Communicate with the Public, Classification No. CIO 2184.0-P02.1 (June 20, 2011).
3. Memorandum from General Counsel Scott Fulton, *Guidance on Indirect Lobbying* (February 2, 2010).

cc: The Honorable Barbara Boxer
Ranking Member

United States Senate
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
WASHINGTON, DC 20510-6175

May 19, 2015

The Honorable Gina McCarthy
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Dear Administrator McCarthy:

On January 7, 2015, the Environmental Integrity Project (EIP) and other environmental organizations filed a Complaint for Declaratory and Injunctive Relief in the United States District Court for the District of Columbia seeking to compel the Environmental Protection Agency (EPA) to act on an EIP petition. This EIP petition was submitted on October 24, 2012, requesting EPA to add the Oil and Gas Extraction Industry, Standard Industrial Classification Code 13, to the list of facilities required to report under the Toxics Release Inventory (TRI). We believe that EPA should act immediately to reject the October 2012 EIP petition because it is frivolous, inappropriate, and unnecessary. An EPA denial would both respond to the initial petition and render the complaint moot.

The initial EIP petition argues that EPA should expand the current TRI to include the Oil and Gas Extraction industry. Such an action runs counter to the intent of the TRI and would further diminish the limited value that the current TRI serves, which we believe should be focused more narrowly. EPA's website describes the history of the TRI:

> The TRI Program was created in response to several events that raised public concern about local preparedness for chemical emergencies and the availability of information on hazardous substances.
>
> On December 4, 1984, a cloud of extremely toxic methyl isocyanate gas escaped from a Union Carbide Chemical plant in Bhopal, India. Thousands of people died that night in what is widely considered to be the worst industrial disaster in history. Thousands more died later as a result of their exposure, and survivors continue to suffer with permanent disabilities. In 1985, a serious chemical release occurred at a similar plant in West Virginia.
>
> In 1986, Congress passed the Emergency Planning and Community Right-to-Know Act (EPCRA) to support and promote emergency planning and to provide the public with information about releases of toxic chemicals in their community. Section 313 of EPCRA established the Toxics Release Inventory.

When the Senate deliberated on the structure of the TRI, it rejected a broad scope and focused the inventory on manufacturing operations – then defined as Standard Industrial Classification (SIC) Codes 20 through 39[1] – with limits on the size of facilities that reported. These constraints were designed to assure that facilities posing a potentially significant threat to populated areas were the targeted reporters, and this structure was retained in the final legislation.

The initial inventories produced results focused on these manufacturing facilities that are typically in populated areas because of the sizeable work forces they employ. However, in 1997, EPA strayed from the appropriate TRI focus and chose to use its authority to expand the facilities required to report under the inventory, adding seven new categories of industries to the reporting scope. These industry groups are metal mining, coal mining, electric utilities, commercial hazardous waste treatment, chemical and allied products wholesale, petroleum bulk terminals and plants (also known as stations) - wholesale, and solvent recovery services.

This action, particularly the inclusion of metal mining, diminished the value of the TRI. The metal mining industry must submit as "releases" on their TRI reports the trace amounts of naturally-occurring metal and metal compounds that are present in the rock and dirt that is moved and managed at a mine site. As EPA notes in the 2011 TRI National Analysis Overview:

> The vast majority of its total disposal or other releases are on-site land disposals and are a result of very small concentrations of metals naturally present in the ore body.

In fact, 85 to 99 percent of what the metal mining industry reports consists of the management of these naturally-occurring substances. Similarly, the overwhelming majority of all mining industry releases are reported to on-site land-based units. These releases are characterized by low concentrations of chemicals in huge volumes of inert materials.

As a result of EPA's decision to expand the TRI in 1997, the information available to the public, through TRI, is far from the original congressional intent. This shift is clearly evident in an EPA observation in the recent release of the 2013 TRI:

> In 2013, the metal mining sector reported the largest quantity of total disposal or other releases, accounting for 47% of the releases for all industries. It also represents almost three quarters (71%) of the on-site land disposal for all sectors in 2013.

Almost half of the releases reported on the TRI are from the disposal of rock and dirt with minor amounts of toxic chemicals. Consequently, the value of information from the initial inventories has been cut in half.

At the same time that EPA moved to add metals mining to the TRI, it chose not to consider oil and gas exploration and production facilities. In explaining its decision not to propose expansion to oil and gas exploration and production facilities, EPA stated rather straightforward reasons:

---

[1] SIC Codes have subsequently been replaced by the North American Industry Classification System (NAICS).

> This industry group is unique in that it may have related activities located over significantly large geographic areas. While together these activities may involve the management of significant quantities of EPCRA section 313 chemicals in addition to requiring significant employee involvement, taken at the smallest unit (individual well), neither the employee nor the chemical thresholds are likely to be met.[2]

Despite substantial new development of American oil and natural gas, these realities previously cited by EPA remain. Consequently, nothing has changed since the inception of the TRI to suggest that its purposes would be served by adding another high volume, low toxicity waste industry – particularly one that would overwhelmingly fall outside the reporting requirement thresholds.

For these reasons, we strongly believe that EPA should reject the EIP petition as soon as possible.

Sincerely,

James M. Inhofe
Chairman

David Vitter
U.S. Senator

M. Michael Rounds
U.S. Senator

[2] 61 Fed. Reg. 33588, 33592 (June 27, 1996).

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 0 2 2015

OFFICE OF
ENVIRONMENTAL INFORMATION

The Honorable James M. Inhofe
Chairman
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for your letter dated May 19, 2015, regarding the petition the U.S. Environmental Protection Agency (EPA) received in October 2012, requesting that the EPA add the Oil and Gas Extraction sector, as defined by Standard Industrial Classification code 13, to the scope of the Toxics Release Inventory.

We continue to review the petition and pertinent information, and we intend to respond in accordance with applicable law, including the Administrative Procedure Act and the Emergency Planning and Community Right-to-Know Act.

Again, thank you for your letter. If you have any questions, please contact me or have your staff contact Thea Williams in the EPA's Office of Congressional and Intergovernmental Relations at williams.thea@epa.gov or (202) 564-2064.

Sincerely,

Renee P. Wynn
Acting Assistant Administrator

United States Senate
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
WASHINGTON, DC 20510-6175

June 26, 2015

Ken Kopocis
Deputy Assistant Administrator
Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Deputy Assistant Administrator Kopocis,

It has come to my attention that the U.S. Environmental Protection Agency (EPA) recently exercised a rarely used "special case" authority, one employed less than a dozen times since the adoption of the Clean Water Act (CWA). The effect was to take away from the U.S. Army Corps of Engineers (Corps) the jurisdictional determination (JD) for the Cargill Industrial Salt Harvesting Facility in Redwood City, California, an industrial facility the EPA refused to address three years earlier.

It is my understanding that the project proponent began discussions with both the EPA and the Corps as early as 2006 regarding the site. Then, in May 2012, they made a formal request to both agencies for an approved JD. It was at this stage that the proponent asked the EPA to utilize its authority on the front end in order to avoid an end-of-process surprise. The EPA refused, indicating that the Corps should process the JD in the traditional manner, and that EPA would remain engaged for support and "would not add additional time to the Corps' decision process."

During the three years that the Corps and EPA considered this matter, the Office of Chief Counsel for the Corps, in coordination with its regulatory staff, provided an elaborate analysis regarding the history and characteristics of this unique industrial site (including a federal permit issued in 1940) and the applicability of both the CWA and the Rivers and Harbors Act (RHA) to it. As to the CWA, the Corps determined that there is no basis for the exertion of jurisdiction. On March 18, 2015, the Corps notified EPA that it would be issuing the JD. It was only at this point the EPA notified the Corps that it planned to exert its "special case" authority and take over the CWA portion of the JD. The Corps issued a JD regarding the applicability of the RHA to the site on March 19, 2015. In addition, the Regional Administrator for the EPA in San Francisco informed the media that its review of the matter would take until late 2015 or even 2016, which is nearly four years after the proponent first asked EPA to step in.

In light of these events and circumstances, please respond to the following questions no later than July 10, 2015:

1. Why, specifically, did the EPA feel that utilizing its "special case" authority in this instance was necessary and appropriate?

2. As to the EPA's timing, why did the agency wait over three years to exercise its "special case" authority instead of doing so early on when asked?

3. Why, specifically, did the EPA disagree with the legal analysis of the Office of Chief Counsel of the Corps when it determined that there was no basis for the exertion of jurisdiction under the CWA?

4. How will the EPA's JD analysis for this site change under the new Final "Waters of the United States" Rule?

5. What is the EPA's timing for completing the JD?

If you have any questions regarding this letter, please feel free to have your staff contact the Senate Committee on Environment and Public Works Majority Office at (202) 2246176.

Sincerely,

James Inhofe
Chairman
Senate Committee on Environment and Public Works

cc: Gina McCarthy, Administrator, U.S. Environmental Protection Agency
Jared Blumenfeld, Region IX Administrator, U.S. Environmental Protection Agency

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SEP 16 2015

OFFICE OF WATER

The Honorable James Inhofe
Chairman
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510-6175

Dear Mr. Chairman:

Thank you for your June 26, 2015, letter regarding the Clean Water Act jurisdictional status of the Cargill Redwood City Site (Cargill Site), and your interest in the process for determining the scope of CWA jurisdiction.

The Cargill Site has been used for many years to collect brine in impoundments for final evaporation and salt harvesting. The brine is prepared by drawing saltwater from the San Francisco Bay and pumping it to large salt ponds for evaporation at sites around the Bay Area. The concentrated saltwater is then pumped to the Cargill Site for final evaporation and harvesting. The Corps of Engineers San Francisco District has consistently determined that salt ponds in the Bay Area are covered under the CWA, determinations that have been upheld in federal court. The Cargill Site is being proposed, in part, for conversion to development and EPA understands that it was this change that was the basis for Cargill's request to the Corps San Francisco District for a jurisdictional determination.

The EPA is responsible under the CWA for determining the scope of jurisdiction for all programs under the Act, including the section 404 permit program. The EPA and the Corps developed a Memorandum of Agreement that establishes procedures for coordination among the agencies in making jurisdictional determinations under the section 404 program. This MOA does not provide for the EPA to "take away" authority from the Corps but rather sets forth an appropriate allocation of responsibilities between EPA and the Corps. The EPA may make the final determination where there are circumstances involving significant issues or technical difficulties, and where clarifying guidance may be needed.

The EPA and the Corps San Francisco District agreed at the time Cargill requested that the EPA make the jurisdictional determination at the Cargill Site that such determination did not raise significant national policy or technical issues. It was only after Corps Headquarters took the unusual action of preparing a novel legal memorandum specific to the Cargill Site that significant legal and technical inconsistencies with past practice were identified. The novel legal theories of Corps Headquarters raised sufficient concern that the Office of the Assistant Secretary of the Army (Civil Works) chose to review the process invoked by the Corps General Counsel and his Office in this matter. The EPA, in coordination with the Office of the Assistant Secretary, determined that it was appropriate for the agency to conduct an independent review regarding CWA jurisdiction at the Cargill Site and, on that basis, designated the Cargill Site a "special case" under the MOA.

The EPA Region 9 in San Francisco is now working expeditiously to collect technical information regarding the Cargill Site to supplement the Corps record. I emphasize that the EPA has made no decisions regarding CWA jurisdiction at the Cargill Site. The agency will make a final jurisdictional determination consistent with science, the law, and our experience in San Francisco Bay. The EPA intends to make the determination with input from Cargill and the Corps San Francisco District. The process will be transparent and our record for this action will be made publicly available.

Thank you again for your letter. Please feel free to contact me if you have any additional questions or your staff may contact Denis Borum in the EPA's Office of Congressional and Intergovernmental Relations at (202)564-4836 or borum.denis@epa.gov.

Sincerely,

Kenneth J. Kopocis
Deputy Assistant Administrator

Congress of the United States
Washington, DC 20515

May 15, 2015

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Administrator McCarthy:

We write regarding the Environmental Protection Agency (EPA) proposals to regulate carbon dioxide (CO2) emissions from fossil fuel fired existing electric generating units under section 111(d) of the Clean Air Act, and specifically regarding the agency's pending "federal plan" rulemaking and consultations with small business entities. In particular, in January 2015, EPA announced it was considering a potential Small Business Advocacy Review (SBAR) panel for this rulemaking.

Under the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), EPA is required to convene a SBAR panel before publishing a proposed rule that will have a significant economic impact on a substantial number of small entities, including small government entities like publicly owned electric utilities.[1] Under SBREFA, EPA has an obligation to solicit and receive meaningful stakeholder input during the development of the federal plan the agency intends to propose this summer when it issues the final rule under Section 111(d). As set forth in EPA guidance entitled "Final Guidance for EPA Rulewriters: Regulatory Flexibility Act as Amended by the Small Business Regulatory Enforcement Fairness Act 52 (Nov. 2006)," the process allows small entity representatives (SERs) to provide advice and recommendations to the SBAR panel on the material EPA has prepared in connection with the rulemaking.[2]

It is our understanding that EPA informed participants involved in this process on April 30, 2015, that it was officially convening a SBAR panel. At the same time, however, it would appear that EPA is very close to the time when the agency will be submitting the proposed federal plan to the Office of Management and Budget (OMB) for interagency review. It is not clear how EPA can solicit, receive, and incorporate meaningful stakeholder input from small entities into the soon-to-be proposed federal plan if the agency intends to meet its summer 2015 deadline. In light of the SBREFA requirements and EPA's guidance on the SBAR panel process, we request your response to the following questions:

---

[1] *See* 5 U.S.C. § 609.

[2] *See* guidance at p. 52 and available at http://www.epa.gov/rfa/documents/Guidance-RegFlexAct.pdf.

1. Will EPA provide comprehensive, but understandable, information to SERs regarding its proposed federal plan rulemaking and comparable alternatives to the proposed rule that would minimize economic impacts on small entities?

2. Given the fact that EPA notified small entities on April 30, 2015, that it intends to officially convene a SBAR panel and the outreach meeting with SERs is scheduled for May 14, 2015, how can the agency provide sufficient information far enough in advance of both the preliminary outreach meeting and the SBAR meeting with SERs to afford a meaningful opportunity for SERs to review and analyze the information and to develop substantive comments and recommendations for the SBAR panel's consideration?

3. Will the draft of the proposed plan submitted to OMB for interagency review reflect the stakeholder input from the SBAR panel, which is expected to be convened only weeks before the draft plan would need to be submitted to OMB for interagency review if EPA is to meet its summer 2015 deadline for issuing the proposed rule?

Please provide written answers to the committees no later than June 5, 2015. If you have any questions, please contact Mandy Gunasekara of the Senate Majority Environment and Public Works Committee staff at 202-224-6176 or Mary Neumayr of the House Majority Committee on Energy and Commerce Committee staff at 202-225-2927.

Sincerely,

James M. Inhofe
Chairman
Committee on Environment & Public Works

David Vitter
Chairman
Committee on Small Business & Entrepreneurship

Jeff Sessions
United States Senator

Roger Wicker
United States Senator

Shelley Moore Capito
United States Senator

Fred Upton
Chairman
Committee on Energy and Commerce

Steve Chabot
Chairman
Committee on Small Business

Ed Whitfield
Chairman
Committee on Energy and Commerce
Subcommittee on Energy and Power

Joe Barton
Chairman Emeritus
Committee on Energy and Commerce

Pete Olson
Vice Chairman
Committee on Energy and Commerce
Subcommittee on Energy and Power

Robert E. Latta
Member
Committee on Energy and Commerce

David B. McKinley
Member
Committee on Energy and Commerce

Mike Pompeo
Member
Committee on Energy and Commerce

H. Morgan Griffith
Member
Committee on Energy and Commerce

Bill Johnson
Member
Committee on Energy and Commerce

Billy Long
Member
Committee on Energy and Commerce

Bill Flores
Member
Committee on Energy and Commerce

Richard Hudson
Member
Committee on Energy and Commerce

cc: The Honorable Barbara Boxer, Ranking Member
U.S. Senate Committee on Environment and Public Works

The Honorable Jeanne Shaheen, Ranking Member
U.S. Senate Committee on Small Business and Entrepreneurship

The Honorable Frank Pallone, Ranking Member
Committee on Energy and Commerce

The Honorable Bobby Rush, Ranking Member
Subcommittee on Energy & Power

The Honorable Nydia Velázquez, Ranking Member
Committee on Small Business

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SEP 11 2015

OFFICE OF
AIR AND RADIATION

The Honorable James M. Inhofe
Chairman
Committee on Environment & Public Works
United States Senate
Washington, D.C. 20510

Dear Chairman Inhofe:

Thank you for your letter dated May 15, 2015, to U.S. Environmental Protection Agency Administrator Gina McCarthy, in which you raise concerns regarding the Small Business Advocacy Review (SBAR) panel for the EPA's proposed rulemaking on August 3, 2015, "Federal Plan Requirements for Greenhouse Gas Emissions from Electric Utility Generating Units Constructed on or Before January 8, 2014" (proposed Federal Plan). The Administrator asked that I respond on her behalf.

The proposed Federal Plan is an outgrowth of the Clean Power Plan for existing power plants, also called the Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Generating Units (79 FR 34830) that were finalized on August 3, 2015. The EPA takes seriously our obligations to small entities and will comply fully with both the spirit and the letter of the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA). In May, the EPA held several meetings with the Small Entity Representatives (SERs) to present the agency's current thinking about regulatory options for the proposed Federal Plan.

As required by section 609(b) of the RFA, the EPA also convened a Small Business Advocacy Review (SBAR) Panel to obtain advice and recommendations from small entity representatives that potentially would be subject to the rule's requirements. The SBAR Panel evaluated the assembled materials and small entity comments on issues related to elements of an RFA. A copy of the full SBAR Panel Report is available in the rulemaking docket (EPA-HQ-OAR-2015-0199), which will be available when the proposed federal plan publishes in the Federal Register. The discussions with the SBAR Panel were robust and, as you will see from the report, yielded a number of suggestions that we have either incorporated with the proposed Federal Plan or are taking comment on.

While the SBAR panel itself has been completed, EPA encourages all stakeholders to submit comments via docket number EPA-HQ-OAR-2015-0199. The comment period will be open for 90 days following publication in the Federal Register. The EPA will take comments received from small businesses and other stakeholders into account as we craft the final rulemaking.

The EPA will accept comments on the proposed federal plan for 90 days following publication in the Federal Register. Comments on the proposed federal plan requirements, identified by Docket ID No. EPA-HQ-OAR-2015-0199, can be submitted by one of the following methods:

- Federal Rulemaking Portal www.regulations.gov: Follow the online instructions for submitting comments.
- Email: Send your comments via electronic mail to a-and-r-Docketa@epa.gov, Attention Docket ID No. EPA-HQ-OAR-2015-0199.
- Facsimile: Fax your comments to (202) 566 9744, Attention Docket ID No. EPA-HQ-OAR-2015-0199.
- Mail: Send your comments to: Environmental Protection Agency, EPA Docket Center (EPA/DC), Mailcode: 28221T, 1200 Pennsylvania Ave., NW, Washington, DC 20460, Attention Docket ID No. EPA-HQ-OAR-2015-0199. In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: Desk Officer for EPA, 724 17th Street NW, Washington, DC 20503.
- Hand Delivery: Deliver your comments to: EPA Docket Center, Room 3334, EPA West Building, 1301 Constitution Ave., NW, Washington, DC, 20004, Attention Docket ID No. EPA-HQ-OAR-2015-0199. Such deliveries are accepted only during the Docket's normal hours of operation (8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays) and special arrangements should be made for deliveries of boxed information.

For more information about these final and proposed rules, visit http://www2.epa.gov/cleanpowerplan. Supportive materials are available through our website and my staff have been, and will continue to be, available to provide technical assistance to stakeholders regarding the EPA's rules to address carbon pollution from power plants.

Again, thank you for your letter. If you have further questions, please contact me or your staff may contact Kevin Bailey in the EPA's Office of Congressional and Intergovernmental Relations at bailey.kevinj@epa.gov or (202) 564-2998.

Sincerely,

Janet G. McCabe
Acting Assistant Administrator

United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

February 3, 2016

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Dear Administrator McCarthy:

This letter follows up on your testimony before the U.S. Senate Committee on Environment and Public Works (EPW Committee) on September 16, 2015, regarding the blowout at the Gold King mine site in Colorado. As you know, the EPW Committee has been conducting oversight into the causes, response, and impacts from the release of more than 3 million gallons of contaminated mine water by the U.S. Environmental Protection Agency (EPA) and its contractors who were working at the site on August 5, 2015. EPA announced on August 18, 2015, that the U.S. Department of the Interior (DOI) "will lead an independent assertion of the factors that led to the Gold King Mine incident on August 5, 2015."[1] DOI announced two days later that the Bureau of Reclamation (BOR) would lead the DOI review.[2]

EPA issued a preliminary report of its initial review of the causes of the Gold King mine blowout on August 26, 2015. At the EPW Committee hearing, you were asked several questions about the actions and events leading up to and immediately following the blowout, but you deferred answering many of them, claiming the answers would be provided instead by DOI's purported independent review that was ongoing at the time of the hearing. You asserted that DOI did not have a conflict of interest, was the appropriate entity to conduct the review, and that the review itself was independent from EPA. You also stated that EPA did not review a draft of or provide direction into the scope of DOI's work. Instead, you explained that EPA had reviewed only a draft press release announcing the start of the DOI review:

---

[1] http://www.epa.gov/goldkingmine/epa-announces-us-department-interior-lead-independent-review-gold-king-mine-release.

[2] https://www.doi.gov/pressreleases/pressreleases/bureau-reclamation-lead-interior-department%E2%80%99s-independent-review.

Ms. McCarthy. I do not believe they have a conflict of interest. They are independent. They should do a good job.

***

Ms. McCarthy. Senator, we were as, I think, sensitive as you were to making sure that this review was truly independent. One of the decisions we made to ensure that was for EPA not to actually ourselves control the scope of the investigation. We thought it was important for the independence of DOI that they actually articulated that scope themselves so that EPA wouldn't be accused of narrowing that inappropriately.

So we are leaving that up to DOI. I am happy to follow up to see if I can be helpful in getting any information on how they have defined that. But as far as I know, EPA has not seen that documentation either.

***

Ms. McCarthy. EPA did not dictate the scope of that investigation.

***

Ms. McCarthy. The independent agency is going to dictate that themselves, and we are going to actually live with whatever scope DOI is appropriate as an independent investigator.

***

Ms. McCarthy. Well, sir, I am continuing to try to make sure that EPA is not perceived as interfering in this investigation in any way that would question the independence of DOI's review. And that is what we are going to continue to do.

***

Ms. McCarthy. In this case, I do not believe that we have seen that type of documentation.

***

Ms. McCarthy. Yes, we have seen the press release, that is what we have seen. And I know that their review is going to be looking at the incident itself and the contributing factors. Beyond that I haven't seen a limitation on how they are going to conduct that.

***

> *Ms. McCarthy. No, sir, the only communication we have had was to look at the press release that was issued. We are hands-off on this to address the very issue that you are concerned about, which is our independence.*

A series of follow-up questions about the EPA's work at the site were sent to you on October 20, 2015, for the hearing record. Three months have passed, and the EPW Committee has not yet received your responses. Since these questions for the record were submitted, several events have called into question the accuracy and completeness of your September 16, 2015, testimony before the EPW Committee.

First, DOI released its report on October 22, 2015, of its purported independent evaluation, which included input from the U.S. Army Corps of Engineers. The DOI report found the blowout could have been prevented had the site been properly evaluated and the engineering plan revised before excavation work began. However, the report noted that the events at the work site in the days prior to or immediately after the blowout were beyond the scope of the DOI review. The DOI report also describes coordination between the EPA officials at the Gold King site and BOR staff in the weeks leading up to the blowout, raising further questions about the apparent conflict of interest and lack of independence with the DOI review beyond those articulated in the questions for the record. Documents obtained by the EPW Committee in the course of its ongoing oversight also show extensive coordination over several years between EPA and DOI officials concerning legal responsibility and options for cleaning up contamination from abandoned mine sites in the Animas River watershed, including the Gold King mine and the nearby Red and Bonita and Sunnyside mines, the closure of which may have contributed to conditions that led to the Gold King blowout.

Second, notwithstanding your assertions that EPA was not involved in developing the scope of DOI's review, it now appears that EPA officials were involved in reviewing and providing input to DOI related to its investigation. On December 8, 2015, EPA issued an addendum to its August 26, 2015, preliminary report based on interviews EPA officials had with the on-scene coordinators,[3] who may be fact witnesses in an ongoing Office of Inspector General investigation.[4] According to a December 18, 2015, letter sent to the EPA Inspector General by the House Natural Resources Committee,[5] raising concerns about these interviews, it appears a senior EPA official received a copy of the draft scope for the DOI review on August 18, 2015, and told a BOR official, "It looks good to me, and I will share up my management chain." These events seem to contradict your repeated assertions at the September 16, 2015 hearing that EPA had reviewed only a DOI press release and had no role in DOI's independent review, including advising DOI about what should be within the scope of its work.

---

[3] http://www.epa.gov/sites/production/files/2015-12/documents/gkmaddendumfinal.pdf.
[4] http://www.epa.gov/sites/production/files/2015-11/documents/newstarts_11-04-15_gkm.pdf.
[5] Letter to Arthur A. Elkins, Jr., Inspector General, U.S. Environmental Protection Agency, from Rob Bishop, Chairman, and Louie Gohmert, Chairman, Subcommittee on Oversight and Investigation, Natural Resources Committee, House of Representatives, sent December 18, 2015, at footnote 17; available at: http://naturalresources.house.gov/uploadedfiles/letter_to_epa_oig_12_18_15.pdf.

Accordingly, given our concerns that your testimony appears at odds with facts showing extensive coordination between EPA and BOR and other DOI officials with the Gold King site and possibly about the DOI's review of the blowout itself, please clarify whether your testimony that DOI did not have a conflict of interest, that its review would be independent, and that EPA officials had no involvement in DOI's review remain accurate and complete. In your response, please also provide copies of all communications between EPA, DOI, and the Army Corps of Engineers concerning the DOI review of the Gold Mine blowout.

Please provide your response to this letter, as well as the responses to the EPW committee's questions for the record dated October 20, 2015, no later than February 17, 2016. Please have your staff contact Byron Brown on the EPW Committee majority staff or Mandy Tharpe on Senator Rounds' staff with any questions concerning this letter.

Sincerely,

JAMES M. INHOFE
Chairman,
Committee on Environment
and Public Works

M. MICHAEL ROUNDS
Chairman, Subcommittee on Superfund,
Waste Management, and Regulatory
Oversight

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR 14 2016

OFFICE OF
SOLID WASTE AND
EMERGENCY RESPONSE

The Honorable James M. Inhofe
Chairman
Committee on Environment and Public Works
United States Senate
Washington D.C. 20510

Dear Mr. Chairman:

Thank you for your letter of February 3, 2016, regarding the Department of Interior's (DOI) Technical Evaluation of the Gold King Mine incident. The Environmental Protection Agency (EPA) shares your goal of preventing accidental releases from abandoned mine sites. The challenge is significant. Thousands of old mines throughout the country are abandoned, posing significant environmental and public health dangers. Because protecting the public from contaminated releases from abandoned mines is so important, the EPA has been committed from the start to understanding the causes of and applying the lessons learned from Gold King Mine to other ongoing and future cleanups.

Internally, the agency immediately undertook its own comprehensive review. This was critical, among other reasons, to ensure that the agency's actions were not repeated in similar work then on-going. But we did not stop there. The agency recognized that only an independent analysis could give the public, and especially those communities directly affected, the needed confidence that the EPA was committed to understanding what went wrong at the Gold King Mine and taking the action necessary to prevent future mine site releases. Of potential third-party candidates to perform such an analysis, both the U.S. Army Corps of Engineers (Corps) and the Department of Interior (DOI) had the requisite technical expertise. However, the Corps raised concerns that because of its extensive support of EPA's Superfund cleanups, including at numerous mine sites, it may not be considered adequately independent. At the recommendation of the Corps, DOI was selected.

Ultimately, all parties agreed that DOI's Bureau of Reclamation (BOR) was best positioned to lead an independent study, which BOR proceeded to do. Peer reviews by relevant agencies, including the U.S. Geological Survey (USGS), the Corps and Bureau of Land Management (BLM) were being considered. BOR decided to exclude the BLM when it was identified as a potential landowner.

The scope of BOR's review, as well as its investigatory process and methods, was up to BOR, solely, exclusively, and without interference from EPA. Any unnecessary involvement by the

EPA would have defeated the agency's very purpose in commissioning a review in the first place, by appearing to compromise BOR's independence. Indeed, the EPA strived to and in fact did maintain an arms-length distance throughout the process. Relevant EPA staff reviewed BOR's independently developed Statement of Work (SOW), but only for the narrow purpose of confirming that the agency's minimum goals for the analysis – i.e. the questions we needed answered – would actually be addressed. For legal reasons, including authorizing payment to BOR for its work, the EPA was also required to include BOR's SOW in a formal interagency agreement, which was accomplished by incorporating it into an existing agreement between the agencies. To my knowledge, the EPA had no further input, formally or informally.

With respect to the Committee's request for copies of all communications between the EPA, DOI, and the Corps concerning the DOI review of the Gold King Mine blowout, the EPA is working diligently to identify and collect responsive materials and will coordinate with your staff to make appropriate productions as expeditiously as possible.

Again, thank you for your interest in the EPA's important cleanup efforts at Gold King Mine, as well as thousands of other abandoned mine sites across the country, many posing significant risks to public health and safety in surrounding communities. If you have any further questions, please contact me, or your staff may contact Carolyn Levine, in EPA's Office of Congressional and Intergovernmental Relations at levine.carolyn@epa.gov or 202-564-1859.

Sincerely,

Mathy Stanislaus

Mathy Stanislaus
Assistant Administrator
Office of Land and Emergency Management

United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510–6175

July 28, 2015

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Dear Administrator McCarthy:

As the principal oversight committee in the U.S. Senate with jurisdiction over the Environmental Protection Agency (EPA or Agency), the Committee on Environment and Public Works (EPW) has been investigating EPA's development of rules regulating greenhouse gas emissions from new, existing, and modified power plants. I am writing to object to the ongoing delays and lack of transparency regarding two of the EPW Committee's oversight requests.

In the course of this oversight, a letter was sent to EPA on April 17, 2015, seeking three categories of information and documents no later than May 11, 2015: (1) emails and other documents concerning communications with certain individuals and environmental groups related to these rulemakings; (2) information about contractors EPA has hired; and (3) documents about EPA's internal procedures for developing these rules. It was requested that EPA respond by May 11, 2015. Although EPA has produced documents on a rolling basis over the past three months, EPA has been unwilling to provide detailed information about the overall number of responsive documents that have not yet been provided and has refused to say when it will finish its document production. Questions also remain about the adequacy of EPA's search and its efforts to locate non-electronic copies of Agency records or responsive documents sent or received by EPA staff using personal email accounts.

A separate letter, sent jointly with the House Committee on Natural Resources on June 15, 2015, sought answers to two questions and four categories of documents about EPA's compliance with the Endangered Species Act in development of these rules. This bicameral letter requested a response by June 22, 2015. Although EPA provided a cursory response to the committees' questions on July 13, 2015, EPA's response letter did not even address the outstanding document request. In fact, EPW Committee staff was told on July 17, 2015, that EPA had not yet completed its search and it could not provide an estimate of the number of documents at issue or when it would complete its response.

Our frustrations with these ongoing delays and lack of timely responsiveness to the Committee's document requests have been brought directly to the attention of EPA's Office of Congressional and Intergovernmental Relations and to the Chief Information Officer, Ann Dunkin, who has been nominated to serve as the Assistant Administrator for the Office of Environmental Information. However, EPA still has not provided any documents related to the ESA request and has not providing any updates regarding the status of the search and estimated date of completion for the April 17 request.[1]

EPA's lack of timely and complete responses and the ongoing uncertainty over its document searches, frustrate Congress' ability to fulfill its constitutional duty to perform oversight of the Executive Branch to ensure its actions are executed in accordance with the laws as written by Congress.[2]

As both the April 17 and June 15 requests are overdue, it is expected that EPA will provide the requested information in full without further delay. I appreciate your attention in resolving this matter.

Sincerely,

James M. Inhofe,
Chairman

CC: Rob Bishop, Chairman
Committee on Natural Resources
U.S. House of Representatives

[1] EPA staff has been vague and noncommittal in communications with EPW staff, saying only that an undetermined number of ESA related documents would begin to be provided sometime during the week of July 27 with still no target date for a full response. See, July 17, 2015 email from B. Brown to K. Aarons & T. Dickerson, subject: ESA Letter Follow Up.

[2] For example, the House Committee on Natural Resources is scheduled to hold a hearing on EPA's compliance with ESA in development of the power plant rules on July 29, 2015. To date, EPA has refused to provide any of the requested documents or to make an Agency official available to testify at this hearing. See, http://www.eenews.net/eedaily/2015/07/27/stories/1060022421.

United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

December 4, 2015

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Dear Administrator McCarthy:

I write to express concerns over the Environmental Protection Agency's (EPA) application of the social cost of methane (SCM) in the September 18, 2015, proposed rule for methane emissions from the oil and gas sector.[1] The SCM was developed by EPA officials to represent the theoretical cost of an incremental ton of methane emissions in a given year.[2] EPA's reliance on the SCM estimate for the oil and gas proposal and other rulemakings is inapt. The SCM estimate is based on the deeply flawed methodology underpinning the social cost of carbon (SCC).[3] EPA endorsed the SCM for use in regulatory impact analyses (RIAs) without subjecting the estimate to the necessary level of peer review and public participation. Accordingly, I request EPA fully cooperate with our Congressional inquiry and refrain from citing the SCM in RIAs until these shortcomings are resolved.

At the outset, I am alarmed EPA introduced the SCM during an ongoing review of the SCC by the National Academy of Sciences (NAS).[4] EPA has admitted "any limitations that apply to inputs and modelling assumptions underlying the [SCC] . . . also apply to the [SCM]."[5] The Office of Management and Budget (OMB) Circular A-4 informs agencies to use 3 and 7 percent discount rates in developing RIAs,[6] but the SCC and SCM are both derived from 2.5, 3, and 5 percent discount rates.[7] Similar to the SCC, the SCM is based on global rather than

---

[1] Envtl. Prot. Agency, Oil and Natural Gas Sector: Emission Standards for New and Modified Sources, Proposed Rule, 80 Fed. Reg. 56593 (Sept. 18, 2015), available at https://www.federalregister.gov/articles/2015/09/18/2015-21023/oil-and-natural-gas-sector-emission-standards-for-new-and-modified-sources.

[2] Envtl. Prot. Agency, Whitepaper on Valuing Methane Emissions Changes in Regulatory Benefit-Cost Analysis, Peer Review Charge Questions, and Responses, available at http://www3.epa.gov/climatechange/pdfs/social%20cost%20methane%20white%20paper%20application%20and%20peer%20review.pdf (last accessed Dec. 4, 2015) [hereinafter *Whitepaper*].

[3] *Id.*

[4] The Nat. Academies of Sciences, Bd. On Envtl. Change & Soc'y, Assessing Approaches to Updating the Social Cost of Carbon, http://sites.nationalacademies.org/DBASSE/BECS/CurrentProjects/DBASSE_167526 (last accessed Dec. 4, 2015).

[5] Whitepaper, *supra* note 2.

[6] OFFICE OF MGMT & BUDGET, CIRCULAR A-4: REGULATORY ANALYSIS (Sept. 17, 2003), https://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf [hereinafter *CIR. A-4*].

[7] Whitepaper, *supra* note 2.

domestic costs and benefits,[8] yet Circular A-4 states that agencies must consider the domestic effects.[9] The SCM also used the same faulty set of integrated assessment models as the SCC.[10] These issues, among others, were the subject of public comments submitted on the SCC and are currently under consideration by the NAS.

I am especially concerned by the continued lack of transparency and disregard for well-established peer review and information quality guidelines that underpin the process for developing the SCM, similar to the concerns raised for the SCC. Rather than provide the public notice of EPA's intent to develop estimates for methane, EPA inserted the estimates in the recent rulemakings offering public input only after the estimates had been applied to RIAs. On June 11, 2015, seven members of the Senate Committee on Environment and Public Works wrote President Obama and specifically asked whether a SCM estimate would be used in the potential oil and gas rule.[11] The Committee has yet to receive a response. However, over a year ago EPA had its economists conduct a study creating the SCM[12] without any public notice or input. Critically, this SCM study is a fully taxpayer funded study[13] and is not accessible on EPA's website; in fact, the study is behind a paywall.[14]

In addition, the SCM was not properly peer reviewed for its application to RIAs. Per OMB's "Final Information Quality Bulletin for Peer Review:"

> More rigorous peer review is necessary for information that is based on *novel methods* or presents complex challenges for interpretation. Furthermore, the need for rigorous peer review is greater when the information contains *precedent-setting* methods or models, presents conclusion that are likely to change prevailing practices, or is *likely to affect policy* (emphasis added).[15]

There is no question the SCM meets this definition. The proposed rule for the oil and gas sector marks the first time the EPA has applied the SCM to monetize direct benefits of a rulemaking. Further, the SCM's application set a new precedent for EPA rulemakings affecting methane and has implications for other federal agency actions relating to methane. Environmental activists such as the Environmental Defense Fund have already called for the application of the SCM in

---

[8] Whitepaper, *supra* note 2.
[9] CIR.A-4, *supra* note 6.
[10] Envtl. Prot. Agency, Regulatory Impact Analysis of the Proposed Emission Standards for New and Modified Sources in the Oil and Natural Gas Sector, EPA-452/R-15-002, Aug. 2015, pp. 4-12, available at http://www3.epa.gov/airquality/oilandgas/pdfs/og_prop_ria_081815.pdf.
[11] Hon. James M. Inhofe et al., S. Comm. on Env't & Pub. Works, to President Barack Obama (June 11, 2015), http://www.epw.senate.gov/public/_cache/files/f92db775-750a-4d39-b8e9-f2dcb1873620/methaneoilandgasletter.pdf.
[12] "Estimating the Social Cost of CH4 and N2O Emissions Consistent with U.S. SC-CO2 Estimates" (Alex Marten, Elizabeth Kopits, Charles W. Griffiths, Steve Newbold, and Ann Wolverton). Climate Policy. 2015, available at http://www.tandfonline.com/doi/pdf/10.1080/14693062.2014.912981#.VmHHenarRhE.
[13] *Id.* In footnote of study, "This work was authored as part of the Contributor's official duties as an Employee of the United States Government and is therefore a work of the United States Government."
[14] *Id.* To download the article it costs $48.
[15] OFFICE OF MGMT & BUDGET, INFORMATION QUALITY GUIDELINES (Oct. 1, 2002), available at https://www.whitehouse.gov/sites/default/files/omb/inforeg/iqg_oct2002.pdf [hereinafter *IQA Guidelines*].

EPA-Department of Transportation's heavy-duty truck rule.[16] The Sierra Club has also urged the Bureau of Land Management to use such an estimate in reviewing applications for coal leases on federal lands.[17] If the Administration's far-reaching application of the SCC is any indication, I can expect the SCM's use to spread well beyond the EPA. As such, robust peer review is essential.

OMB information quality guidelines mandate that such information meet a higher level of transparency.[18] Even EPA's recently updated Peer Review Handbook explained "[o]ne important element in ensuring that decisions are based on sound and defensible science is to have an open and transparent peer review process."[19] Despite these directives, EPA's internal peer review of the SCM's application to RIAs was neither transparent nor robust. Only after EPA proposed the methane rules the Agency provided—buried at the bottom of the EPA webpage for the SCC—a paragraph on the SCM and a link to a whitepaper on peer review of the estimates.[20] EPA did not seek any public input in this peer review process and seemingly sought to shield its work on the SCM from necessary sunshine. EPA did not even include the SCM peer review process on its publicly available Peer Review Agenda.[21]

I am equally concerned EPA has deemed this peer review process sufficient to justify the SCM's use in rulemakings. Indeed, it is unclear when or how EPA developed the charge questions and selected the three peer reviewers. All three reviewers identified the need for improvement to the SCM.[22] Critically, one peer reviewer advised "a more extensive public peer review process should be pursued going forward that will give the public greater confidence in the ultimate values."[23] Now, nearly a year after EPA first sought peer review of the estimates and only after the SCM had been applied to RIAs, EPA is seeking public comment on the SCM.

The timing of the SCM's application is seemingly driven by the international climate negotiations so the Obama Administration can cite regulatory actions for methane and tout outlandish benefit estimates for reducing methane conjured by the SCM. For example, at a 3% discount rate in 2025 the SCM is a whopping $1,500 per ton.[24] EPA uses the SCM to justify

---

[16] InsideEPA, *Environmentalists Seek New 'Social Cost of Methane' For Truck GHG Rule* (Aug. 27, 2014), http://insideepa.com/inside-epa/environmentalists-seek-new-social-cost-methane-truck-ghg-rule.

[17] Nathaniel Shoaff & Marni Salmon, Incorporating the Social Cost of Carbon into National Environmental Policy Act Reviews for Federal Coal Leasing Decisions, Sierra Club (Apr. 2015), pg. 9, available at http://content.sierraclub.org/environmentallaw/sites/content.sierraclub.org.environmentallaw/files/scc%20white%20paper%20final.pdf.

[18] IQA Guidelines, *supra* note 15.

[19] Envtl. Prot. Agency, Science & Tech. Policy Council, Peer Review Handbook, 4th Ed. (Oct. 2015), available at http://www2.epa.gov/sites/production/files/2015-09/documents/final_epa_peer_review_handbook-4th_ed_091415_dummy_link.pdf.

[20] Envtl. Prot. Agency, The Social Cost of Carbon, available at http://www3.epa.gov/climatechange/EPAactivities/economics/scc.html (last accessed Dec. 4, 2015).

[21] Envtl. Prot. Agency, EPA Science Inventory, Peer Review Agenda, available at http://cfpub.epa.gov/si/si_public_pr_agenda.cfm (last accessed Dec. 4, 2015).

[22] Whitepaper, *supra* note 2.

[23] Whitepaper, *supra* note 2.

[24] InsideEPA, *EPA Uses Novel 'Social Cost of Methane' In Landfill, Oil & Gas Proposals* (Aug. 26, 2015), http://insideepa.com/inside-epa/epa-uses-novel-social-cost-methane-landfill-oil-gas-proposals

regulations where the world benefits but only Americans pay the costs of compliance. In regards to the proposed rule for the oil and gas sector, EPA estimates $460-550 million in global benefits and $320-420 million in domestic costs.[25] However, with respect to the SCC the Administration explained "the domestic benefit would be proportional to be U.S. share of global [gross domestic product]."[26] Applying that logic to the SCM in the proposed oil and gas rule would amount to $124-148 million domestic benefits[27]—far less than the estimated costs of the rule. In fact, virtually all the monetized benefits are attributed to the SCM; without EPA's new SCM estimates the rule would fail the benefit-cost test.

Clearly, this metric is yet another attempt by the Obama Administration to advance an unpopular climate agenda—by inventing a dollar amount for the price of a ton of methane to justify onerous regulations and cite in public statements. Similar to the SCC, the SCM was not part of an open and public process—instead it was quietly inserted into EPA rulemakings. The SCM was not subject to public notice and comment procedures, is built upon a faulty framework and have not been peer-reviewed properly for the purpose of which they are being utilized. These actions only exacerbate the regulatory uncertainty that exists under the Obama Administration's regulatory fiat over the U.S. economy and calls into question the integrity and fate of regulations relying on the SCM.

As such, it is critical the EPA immediately halt the use of the SCM in regulations and respond to the following requests by no later than December 21, 2015. Please also include a copy of your responses to the following requests in the docket for the oil and gas proposal.

1. Please describe the circumstances surrounding when and how the Agency first decided to develop a social cost of methane estimate.
2. Please provide a description of the staff resources dedicated to formulating the social cost of methane estimates.
3. Please describe any efforts by the Agency to seek public input or external expert advice on the social cost of methane during the development stages of the estimates.
4. Please explain what impact President Obama's Climate Action Plan and subsequent White House Methane Strategy had on the Agency's decision to develop a social cost of methane estimate.
5. Please describe the circumstances surrounding when and how the Agency decided to seek peer review of the social cost of methane's application to regulatory impact analyses. This response should include the names and qualifications of all those

---

[25] Envtl. Prot. Agency, Regulatory Impact Analysis of the Proposed Emission Standards for New and Modified Sources in the Oil and Natural Gas Sector, EPA-452/R-15-002, Aug. 2015, pp. 1-9, available at http://www3.epa.gov/airquality/oilandgas/pdfs/og_prop_ria_081815.pdf.

[26] Interagency Working Group on Social Cost of Carbon, United States Government, Technical Support Document – Social Cost of Carbon for Regulatory Impact Analysis – Under Executive Order 12866 (Feb. 2010), pg 11, available at https://www.whitehouse.gov/sites/default/files/omb/inforeg/for-agencies/Social-Cost-of-Carbon-for-RIA.pdf

[27] Wayne J. D'Angelo, EPA's Estimate of the "Social Cost of Methane" Used to Justify New Source Performance Standards for the Oil and Natural Gas Industry, Fracking Insider (Aug. 19, 2015), http://www.frackinginsider.com/regulatory/epas-estimate-of-the-social-cost-of-methane-used-to-justify-new-source-performance-standards-for-the-oil-and-natural-gas-industry/ Note: author determined this figure by applying a 27% proportion of US global GDP to the benefit estimates.

contacted by the Agency to participate in the peer review. Why did the Agency not seek public nominations for peer reviewers? Why was the SCM peer review not included in EPA's Peer Review Agenda?[28]

6. When did EPA make the "Whitepaper on Valuing Methane Emissions Changes in Regulatory Benefit-Cost Analysis, Peer Review Charge Questions, and Responses" publicly available? Why did the Agency post this whitepaper at the bottom of its webpage for the SCC? Why is the whitepaper not available on EPA's webpage for oil and natural gas regulatory actions? Has the Agency considered creating a separate webpage for the SCM?
7. Did the Agency consider seeking the expert advice of the EPA Science Advisory Board or another external peer review panel? If not, why?
8. In response to public comments on the SCC, OMB explained "The [Interagency Working Group] IWG will continue to follow and evaluate literature on the social cost of non-CO2 greenhouse gases and the feasibility of developing non-CO2 social cost estimates."[29] Did the Agency consider asking the Interagency Working Group that developed the social cost of carbon to review the social cost of methane estimates? If not, why?
9. Please describe the process used and input received in developing the seven charge questions provided to the three peer reviewers. Why did the Agency not seek public comment on the charge questions?
10. Please make the SCM study available online as soon as possible and explain why this federally-funded study is not available on EPA's website.
11. Please explain why the EPA did not wait for the NAS to complete its review of the SCC before applying the SCM.

Thank you for your prompt attention to this matter. If you have any questions with this request, please contact the Committee on Environment and Public Works at (202) 224-6176.

Sincerely,

James M. Inhofe
Chairman
Committee on Environment and Public Works

[28] Envtl. Prot. Agency, EPA Science Inventory, Peer Review Agenda, available at http://cfpub.epa.gov/si/si_public_pr_agenda.cfm (last accessed Dec. 4, 2015).
[29] Interagency Working Group on Social Cost of Carbon, United States Government, Response to Comments: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866 (July 2015), available at https://www.whitehouse.gov/sites/default/files/omb/inforeg/scc-response-to-comments-final-july-2015.pdf.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 2 9 2016

OFFICE OF
POLICY

The Honorable James M. Inhofe
Chairman
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for your letter of December 4, 2015, to the U.S. Environmental Protection Agency Administrator Gina McCarthy regarding the social cost of methane. The Administrator asked that I respond on her behalf.

As directed by Executive Orders 12866 and 13563, the EPA must use the best available scientific, technical, economic, and other information to quantify the costs and benefits of rules. Rigorous evaluation of costs and benefits has been a core tenet of the EPA rulemaking process for decades. This fundamental principle of using the best available information underpins the EPA's application of a recently published, peer-reviewed methodology for estimating the benefits of methane emission reductions in regulatory analysis. In accordance with both the Office of Management and Budget and the EPA's guidance, the development and application of this methodology has been subject to extensive external review notably as part of the EPA's Peer Review Agenda and through various public comment opportunities before being applied in recent proposed rulemakings affecting the oil and gas and landfill sectors. Consistent with the agency's practice, the EPA will consider additional public comments received on the proposed analyses before finalizing these regulations.

I am including an attachment prepared by the EPA's technical staff that provides background and responds to your questions concerning the development and review of the EPA's social cost of methane methodology.

Again, thank you for your letter. If you have further questions, please contact me or your staff may contact Thea Williams in EPA's Office of Congressional and Intergovernmental Relations at williams.thea@epa.gov or at (202) 564-2064.

Sincerely,

Laura Vaught

Laura Vaught
Associate Administrator

Enclosure

General Overview of the Development of the EPA's Social Cost of Methane Methodology

Economics research has long acknowledged that emissions of greenhouse gases (GHG) have the potential to impose costs on society. For example, the social cost of carbon ($SC\text{-}CO_2$) is a metric that estimates the monetary value of impacts associated with marginal changes in carbon dioxide (CO_2) emissions in a given year. Estimates of $SC\text{-}CO_2$ therefore provide a way to value changes in CO_2 emissions in benefit-cost analysis (BCA) of policy alternatives. Since 2009, the EPA and other federal agencies have used a set of agreed-upon $SC\text{-}CO_2$ estimates in the BCAs used to evaluate major regulations that affect CO_2 emissions.[1] The interagency process to develop the U.S. Government's (USG) $SC\text{-}CO_2$ estimates was an effort to promote consistency in the way agencies quantify the benefits of reducing CO_2 emissions, or disbenefit from increasing emissions, in the regulatory impact analysis (RIA).

While CO_2 is the primary source of anthropogenic GHG emissions contributing to climate change, other GHGs such as methane (CH_4) are also important contributors[2] to the impacts from climate change. Similar to the $SC\text{-}CO_2$, the social cost of methane ($SC\text{-}CH_4$) is a metric that estimates the monetary value of impacts associated with marginal changes in methane emissions in a given year. It includes a wide range of anticipated climate impacts, such as net changes in agricultural productivity and human health, property damage from increased flood risk, and changes in energy system costs, such as reduced costs for heating and increased costs for air conditioning. It can be used to quantify the benefits of reducing CH_4 emissions, or the disbenefit from increasing emissions, in RIAs.

Prior to August 2015, the EPA quantified potential benefits of CH_4 emission reductions only in sensitivity analyses, using an approximation approach based on the global warming potential (GWP) metric of methane (e.g., EPA 2012a, 2012b). In these analyses, the GWP of methane was used to convert CH_4 emissions reductions to CO_2-equivalents, which were then valued using the $SC\text{-}CO_2$. The limitations of the GWP methodology compared to a direct modeling approach are such that the EPA concluded that the GWP approximation approach would serve as an interim method of analysis until directly-modeled social cost estimates for non-CO_2 GHGs, consistent with the $SC\text{-}CO_2$ estimates developed by the Interagency Working Group (IWG), were developed. The EPA presented GWP-weighted estimates in sensitivity analyses rather than the main BCA.

A recent study by Marten et al. (2014) provided the first set of published estimates of the $SC\text{-}CH_4$ that are fully consistent with the modeling assumptions underlying the USG $SC\text{-}CO_2$ estimates. Specifically, the estimation approach of Marten et al. used the same set of three models, five socioeconomic and emissions scenarios, equilibrium climate sensitivity distribution, three constant discount rates, and an aggregation approach used by the IWG to develop the $SC\text{-}CO_2$ estimates. Prior to Marten et al., there were a number of studies in the scientific literature providing directly-modeled estimates of $SC\text{-}CH_4$, but the EPA had found considerable variation among these estimates in terms of the models and input

---

[1] The benefits from reducing carbon emissions are equivalent to the avoided social costs associated with those emissions. See the February 2010 Technical Support Document (TSD) and November 2013 TSD Update (revised July 2015) on OMB's website for a complete discussion of the methods used to develop the USG $SC\text{-}CO_2$ estimates: http://www.whitehouse.gov/sites/default/files/omb/inforeg/for-agencies/Social-Cost-of-Carbon-for-RIA.pdf, https://www.whitehouse.gov/sites/default/files/omb/inforeg/scc-tsd-final-july-2015.pdf.

[2] See EPA Endangerment Finding: Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009).

assumptions that made them outdated and inconsistent with the methodology underlying the USG SC-CO_2 estimates.[3]

To better incorporate the existing literature on the economic benefits of reducing methane emissions, the EPA has now used the estimates from Marten et al. (2014) to value methane impacts in the BCA for two proposed rules: *Proposed Revisions to the Emission Guidelines and New Source Performance Standards in the Municipal Solid Waste Landfills Sector* (EPA 2015a) and the *Proposed Emission Standards for New and Modified Sources in the Oil and Natural Gas Sector* (EPA 2015b). In addition, the estimates were presented in sensitivity analysis supporting the *Proposed Phase 2 Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles* (EPA 2015c).

Consistent with its standard rulemaking practice and commitment to transparency, rigorous analysis, and public involvement, the EPA has sought public comment on the valuation of non-CO_2 GHG impacts and scientific review of the usage of the SC-CH_4 estimates from Marten et al. (2014) throughout the process leading up to its inclusion in the main BCA's of proposed rules. First, the EPA has sought public comment on the valuation of non-CO_2 GHG impacts in proposed rulemakings since 2011 (EPA 2011a, 2011b). In general, commenters have agreed with the EPA's assessment of the challenges associated with the GWP-based approximation approach to valuing non-CO2 GHG impacts, and supported the use of directly-modeled estimates of the SC-CH_4 to overcome those challenges (EPA 2012a, 2012b). Second, as discussed in detail in the recent proposed rulemakings with methane impacts (EPA 2015a, 2015b, 2015c), both the development and application of the Marten et al. estimates have been subject to extensive review. The study was conducted as part of ongoing basic research by economists at the EPA who regularly conduct and publish research in academic journals to advance understanding of the economic costs, benefits, and impacts of environmental problems. The methodology and resulting estimates themselves underwent a standard double blind peer review process prior to journal publication. Because the Marten et al. study was published fairly recently in the peer reviewed literature, and the application of the Marten et al. approach represents a shift from the prior approach used in RIAs, the EPA then sought additional external peer review before applying this work in the primary analysis of a proposed regulation.

The external peer review of the RIA application of Marten et al. (2014) was designated as influential scientific information (ISI), and was added to the EPA Peer Review Agenda for Fiscal Year 2015 in November 2014, as shown on the EPA Science Inventory website.[4] Because the external peer review was to consider the straightforward process of applying the results of a single paper that was both well suited to use in regulatory analysis and had already undergone peer review for publication in a scientific journal, the EPA conducted a standard letter review of technical issues associated with its application. The public was invited to provide comment on the peer review plan, but the EPA did not receive any comments. Per Executive Order 12866, the proposed regulatory actions using these new estimates—the oil and natural gas sector, the landfill sector, and the medium- and heavy-duty engine and vehicle proposed rulemakings—went through standard OMB review prior to publication, and consistent with

[3] See discussion in U.S. EPA (2012a, 2012b, 2015a).

[4] The Peer Review Agenda is available at: http://cfpub.epa.gov/si/si_public_pr_agenda.cfm. This review is listed under "ISI" and "Office of Policy," "Valuing Non-CO_2 GHG Emission Changes in BCA". Complete record at: http://cfpub.epa.gov/si/si_public_pra_view.cfm?dirEntryID=291976.

agency practice, the EPA sought public comment on the application of these new estimates in the BCA for each of these proposed rulemakings. The agency will consider the comments before finalizing the rules later this year.

All documents pertaining to the external peer review, including a white paper summarizing the Marten et al. (2014) methodology, the charge questions, and each reviewer's full response is available on the EPA Science Inventory webpage, and in the dockets for both the oil and natural gas sector and landfill sector proposed rulemakings. As noted in the online docket for each rulemaking at www.regulations.gov, a copy of the published Marten et al. study is available to the public through the US EPA Docket Center Public Reading Room.[5] The peer reviewers were asked to answer seven charge questions that covered issues such as the EPA's interpretation of the Marten et al. (2014) estimates, the consistency of the estimates with the U.S. Government's SC-CO_2 estimates, the EPA's characterization of the limits of the GWP-approach to value non-CO_2 GHG impacts, and the appropriateness of using the Marten et al. estimates in RIAs. The reviewers agreed with the EPA's interpretation of Marten et al.'s estimates; generally found the estimates to be consistent with the approach taken in the USG SC-CO_2 estimates; and concurred with the limitations of the GWP approach, finding directly modeled estimates to be more appropriate.

As discussed in the RIAs for the oil and natural gas sector and landfill sector proposed rulemakings, the EPA supports continued improvement in the USG SC-CO_2 estimates and agrees with comments from external reviewers that improvements in the SC-CO_2 estimates should also be reflected in the SC-CH_4 estimates. Through many forums, the EPA and other members of the IWG on the SC-CO_2 have received many thoughtful suggestions for areas of potential improvements for the SC-CO_2 estimates. In response, the IWG is currently seeking independent advice from the National Academies of Science, Engineering, and Medicine on how to approach future updates to the SC-CO_2 estimates.[6] In the meantime, the IWG and OMB continue to recommend the use of the current SC-CO_2 estimates in RIAs.[7] The fact that the reviewers agree that the SC-CH_4 estimates are generally consistent with the USG SC-CO_2 estimates, which continue to be recommended by OMB's guidance, and in light of past comments urging the EPA to value non-CO_2 GHG impacts in its rulemakings, led the EPA to conclude that use of the Marten et al. (2014) SC-CH_4 estimates is an analytical improvement over excluding changes in methane emissions from the monetized benefits analysis of recent proposed RIAs.

[5] The online record for Marten et al. (2014) in each rulemaking docket provides complete contact information for the US EPA Docket Center Public Reading Room, including the physical address, phone number, and email address.
[6] Information about the status of the National Academies' review is available on the Academies' website at: http://sites.nationalacademies.org/DBASSE/BECS/CurrentProjects/DBASSE_167526.
[7] https://www.whitehouse.gov/blog/2015/07/02/estimating-benefits-carbon-dioxide-emissions-reductions

References

Marten AL, Kopits KA, Griffiths CW, Newbold SC, Wolverton A. 2014. "Incremental CH4 and N2O mitigation benefits consistent with the US Government's SC-CO2 estimates," Climate Policy 15, 2: 272-298.

U.S. Environmental Protection Agency (EPA). 2011a. Regulatory Impact Analysis: Proposed New Source Performance Standards and Amendments to the National Emissions Standards for Hazardous Air Pollutants for the Oil and Natural Gas Industry. Office of Air Quality Planning and Standards. July. http://www3.epa.gov/ttn/ecas/regdata/RIAs/oilnaturalgasfinalria.pdf.

U.S. Environmental Protection Agency (EPA). 2011b. Proposed Rule: 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards. December. https://www.federalregister.gov/articles/2011/12/01/2011-30358/2017-and-later-model-year-light-duty-vehicle-greenhouse-gas-emissions-and-corporate-average-fuel.

U.S. Environmental Protection Agency (EPA). 2012a. Regulatory Impact Analysis: Final New Source Performance Standards and Amendments to the National Emissions Standards for Hazardous Air Pollutants for the Oil and Natural Gas Industry. Office of Air Quality Planning and Standards, Health and Environmental Impacts Division. April. http://www.epa.gov/ttn/ecas/regdata/RIAs/oil_natural_gas_final_neshap_nsps_ria.pdf.

U.S. Environmental Protection Agency (EPA). 2012b. Regulatory Impact Analysis: Final Rulemaking for 2017-2025 Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards. EPA-420-R-12-016. Office of Transportation and Air Quality, Assessment and Standards Division. August. http://www.epa.gov/otaq/climate/documents/420r12016.pdf.

U.S. Environmental Protection Agency (EPA). 2015a. Regulatory Impact Analysis for the Proposed Revisions to the Emission Guidelines for Existing Sources and Supplemental Proposed New Source Performance Standards in the Municipal Solid Waste Landfills Sector. Office of Air Quality Planning and Standards, Health and Environmental Impacts Division. August. http://www3.epa.gov/ttn/atw/landfill/20150810_landfills_ria.pdf.

U.S. Environmental Protection Agency (EPA). 2015b. Regulatory Impact Analysis of the Proposed Emission Standards for New and Modified Sources in the Oil and Natural Gas Sector. Office of Air Quality Planning and Standards. August. http://www3.epa.gov/airquality/oilandgas/pdfs/og_prop_ria_081815.pdf.

U.S. Environmental Protection Agency (EPA). 2015c. Draft Regulatory Impact Analysis: Proposed Rulemaking for Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles–Phase 2. Office of Transportation and Air Quality, Assessment and Standards Division. June. http://www3.epa.gov/otaq/climate/documents/420d15900.pdf.

THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

JUN 29 2015

The Honorable James Inhofe
Chairman
Committee on Environment and Public Works
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

I am pleased to support the charter of the Chemical Safety Advisory Committee in accordance with the provisions of the Federal Advisory Committee Act, 5 U.S.C. App. 2. The Chemical Safety Advisory Committee is in the public interest and supports the U.S. Environmental Protection Agency in performing its duties and responsibilities.

I am filing the enclosed charter with the Library of Congress. The Chemical Safety Advisory Committee will be in effect for two years from the date it is filed with Congress. After two years, the charter may be renewed as authorized in accordance with Section 14 of FACA (5 U.S.C. App. 2 § 14).

If you have any questions or require additional information, please contact me or your staff may contact Christina Moody in EPA's Office of Congressional and Intergovernmental Relations at moody.christina@epa.gov or (202) 564-0260.

Sincerely,

Gina McCarthy

Enclosure

Congress of the United States

Washington, DC 20515

June 15, 2015

The Honorable Gina McCarthy
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Dear Administrator McCarthy:

We write regarding two proposed Environmental Protection Agency ("EPA") rules to reduce carbon dioxide emissions from power plants as part of President Obama's Climate Action Plan. These rules will regulate greenhouse gas ("GHG") emissions from both existing[1] and new[2] stationary electric utility generating units and are expected to have wide-ranging environmental and economic impacts. In promulgating these Clean Air Act rules, EPA must carefully and lawfully consider all the effects of its rulemaking, including the effects on endangered and threatened species listed under the Endangered Species Act ("ESA"). However, as the rulemaking process concludes, it appears that EPA has not satisfied its obligations under section 7 of the ESA.

The House Committee on Natural Resources and the Senate Committee on Environment and Public Works ("EPW") have jurisdiction over the implementation of the ESA. The EPW Committee also has jurisdiction over EPA's programs in general and the Clean Air Act in particular. Both Committees have been conducting oversight on EPA's lack of consultation in connection with these rules.

---

[1] Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830 (proposed June 18, 2014).

[2] Standards of Performance for Greenhouse Gas Emissions From New Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 1430 (proposed Jan. 8, 2014).

On March 6, 2014, a letter was sent to EPA and the Fish and Wildlife Service ("FWS") by members of the EPW Committee asking 17 questions about the need for and scope of section 7 consultation for the proposed rule for new power plants. The response from the FWS on May 27, 2014, confirmed that EPA had not requested to engage in ESA consultation. EPA's response, dated June 20, 2014, said only that EPA would comply with the ESA. Neither response explained EPA's omission of a "may affect" determination for the proposed rule for new power plants nor included meaningful information necessary to address the EPW Committee's legitimate oversight concerns.

During a March 19, 2015, hearing before the Natural Resources Committee, FWS Director Dan Ashe testified that EPA had not initiated consultation with FWS on the impacts of the two power plant rules on ESA-listed species, including the endangered manatee.[3] Following that hearing, a letter was sent to Director Ashe that sought to clarify whether FWS intended to request that EPA enter into ESA consultation with the FWS on the two rules.[4]

In his response, dated April 20, 2015, Director Ashe confirmed that FWS had not requested that EPA initiate consultation on the power plant rules and did not intend to do so "because . . . EPA has full knowledge of their Section 7 responsibilities."[5] This response raises more questions than it answers.

According to section 7 of the ESA, federal agencies must consult with the appropriate Service whenever a discretionary agency action, including a rulemaking, "may affect" a listed species or designated critical habitat.[6] Federal courts routinely enjoin agency actions, including some taken by EPA, for failure to consult pursuant to section 7 of the ESA.[7]

---

[3] *Examining the Spending Priorities and Missions of the U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration in the President's FY 2016 Budget Proposal: Hearing Before the Subcomms. on Federal Lands and Water, Power and Oceans of the H. Comm. on Natural Resources*, 114th Cong. (2015). The manatee was first listed under the ESA in 1967. *See* Endangered Species, 32 Fed. Reg. 4001 (Feb. 24, 1967).

[4] Letter from Rob Bishop, Chairman, H. Comm. on Natural Resources, to Dan Ashe, Director, U.S. Fish and Wildlife Service (Apr. 2, 2015), http://naturalresources.house.gov/uploadedfiles/lettertoashe_4_2_15.pdf.

[5] Letter from Dan Ashe, Director, U.S. Fish and Wildlife Service, to Rob Bishop, Chairman, H. Comm. on Natural Resources (Apr. 20, 2015), http://naturalresources.house.gov/uploadedfiles/asheresponseletter.pdf.

[6] Endangered Species Act §7, 16 U.S.C. § 1536. The agency must consult with the National Marine Fisheries Service ("NMFS") if the proposed action will affect marine species, or the FWS if the action will affect non-marine species.

[7] *See, e.g.*, W. Watersheds Project v. Kraayenbrink, 632 F.3d 472 (9th Cir. 2011) (enjoining amendments to grazing regulations); Wash. Toxics Coal. v. Envtl. Prot. Agency, 413 F.3d 1024 (9th Cir. 2005) (enjoining EPA's registration of pesticides pending compliance with section 7). The ESA's citizen suit provision explicitly approves injunctions for "violation[s] of any provision of this Act or regulation issued under the authority thereof." 16 U.S.C. § 1540(g)(1)(A).

Further, ESA regulations task each federal agency with "review[ing] its actions at the earliest possible time to determine whether any action *may affect* listed species or critical habitat."[8] According to the FWS's Endangered Species Consultation Handbook, which is intended to guide federal agencies through the ESA's consultation requirements, it is appropriate for an agency to make a "may affect" determination "when [its] proposed action may pose **any** effects on listed species or designated critical habitat."[9] If the agency determines that its proposed action may have *any* effect on a listed species, the agency is required to consult with the appropriate Service – even if the effects are beneficial.[10]

In its "may affect" analysis for the existing power plant rule, EPA determined that the rule is likely to have "positive" effects because it will reduce overall GHG emissions.[11] Citing previous EPA analysis that found it was impossible to determine the effects of reduced GHGs on specific species, EPA also concluded that the reduced GHG emissions brought about by the new rule would cause only "very small changes."[12] Additionally, EPA analogized the "remote" effects of the new rule to the Ninth Circuit Court of Appeals ruling in *Ground Zero Center for Non-Violent Action v. U.S. Dept. of Navy*, where the court found consultation on the possibility of an accidental missile explosion was unnecessary in part because the chance of the explosion occurring was infinitesimal.[13] Additionally, when EPA asserted that the effects are "very small changes" and "remote" it cited a Department of the Interior ("DOI") memorandum regarding the

---

[8] 50 C.F.R. § 402.14(a) (emphasis added).

[9] U.S. Fish and Wildlife Service, Endangered Species Conservation Handbook xvi (emphasis in original).

[10] Karuk Tribe v. U.S. Forest Serv., 681 F.3d 1006, 1011 (9th Cir. 2012) ("The ESA requires consultation with the Fish and Wildlife Service or the NOAA Fisheries Service for any 'agency action' that 'may affect' a listed species or its critical habitat."). *See also* Conservation Cong. v. U.S. Forest Serv., No. CIV. S-13-0832, 2013 U.S. Dist. LEXIS 127671, at *55, 60 (E.D. Cal. Sept. 6, 2013) (explaining that section 7 consultation is required "[s]o long as a [listed species] is present" and that "[e]ven a beneficial effect on the species or habitat 'triggers the requirement.'").

[11] Carbon Pollution Emission Guidelines for Existing Stationary Sources, *supra* note 1, at 34,933.

[12] *Id.* at 34,934. In the ESA section of the proposed rule for existing power plants, EPA refers to the effects of its action as "very small" and "remote." These terms appear to be drawn from consultation regulations promulgated under the previous administration. *See* Interagency Cooperation Under the Endangered Species Act, 73 Fed. Reg. 76,272 (Dec. 16, 2008). *See also* KRISTINA ALEXANDER & M. LYNNE CORN, CONG. RESEARCH SERV., RL 34641, CHANGES TO THE CONSULTATION REGULATIONS OF THE ENDANGERED SPECIES ACT (ESA) 9 (2009). However, those regulations were rescinded in 2009 shortly after President Obama took office and the 1986 consultation rules were reinstated. *See* Interagency Cooperation Under the Endangered Species Act, 74 Fed. Reg. 20,421 (May 4, 2009). EPA's apparent reliance on a rescinded rule and related legal guidance (i.e., the 2008 DOI memorandum, *infra* note 14) casts doubt on Director Ashe's confidence in EPA's "full knowledge of their Section 7 responsibilities."

[13] What EPA fails to mention is that section 7 consultation was not required primarily "because the Navy lacks the discretion to cease Trident II operations at Bangor for the protection of the threatened species." Ground Zero Ctr. for Non-Violent Action v. U.S. Dept. of Navy, 383 F.3d 1082, 1092 (9th Cir. 2002). The court found that President Clinton – not the Navy – determined where the submarine base would be located, so the risks inherent to Trident missiles were attributable to the President's decision and not to the Navy's action. *Id.*

polar bear[14] and a prior EPA rule.[15] EPA conveniently did not mention that these analyses have substantial focus upon the difficulty of tracing the effects of GHG emissions from a single source – not from the entire electricity generating capacity of the United States.

After dismissing these "positive," "very small," and "remote" effects of the rule due to overall reductions in GHG emissions, EPA then determined that section 7 consultation was unnecessary.[16]

It is clear that EPA entirely neglected to assess the ground-level effects of its regulation. The most recent government analysis projects that retirements of coal-fired power plants will double by 2020 as a result of the rule.[17] EPA itself has conducted analysis that also anticipates the early retirement of coal-fired generating units.[18] Disruption and early retirement of operational power plants are precisely the kind of real-world impacts that EPA must assess before promulgating a rule. Specifically, EPA must analyze the effects of its action – including the closure of power plants – through the lens of the ESA.

---

[14] Memorandum from David Longly Bernhardt, Solicitor, U.S. Department of the Interior re: "Guidance on the applicability of the Endangered Species Act's Consultation Requirements to Proposed Actions Involving the emissions of Greenhouse Gases" (Oct. 3, 2008).

[15] Environmental Protection Agency, Light Duty Vehicle Greenhouse Gas Standards and Corporate Average Fuel Economy Standards Response to Comment Document for Joint Rulemaking at 4-102 (Docket EPA-OAR-HQ-2009-4782).

[16] While EPA apparently feels that the effects of GHGs on species are negligible, the Services responsible for listing species under the ESA have found that climate change or global warming affects a plethora of endangered species. According to recovery plans from the USFWS and NMFS, the following species are or may be affected by climate change or global warming: Akiapolaau, Akohekohe, Atlantic salmon, Bay checkerspot butterfly, Butte County meadowfoam, Chinook salmon, Chiricahua leopard frog, chum salmon, Colusa grass, conservancy fairy shrimp, Contra Costa goldfields, delta green ground beetle, desert tortoise, few-flowered navarretia, fleshy owl's clover, Gowen cypress, green's tuctoria, hairy orcutt grass, Hawaii 'Akepa, Hawaii creeper, Holmgren milk-vetch, Hoover's broomspurge, Karner blue, Kauai akialoa, Kauai 'o'o, Lake County stonecrop, large Kauai thrush, Laysan duck, Loch Lomond coyote-thistle, longhorn fairy shrimp, many-flowered navarretia, mat-forming quillwort, Maui 'akepa, Maui parrotbill, Moloka'i creeper, Moloka'i thrush, Mount Graham red squirrel, Nukupu'u, Oahu alauahio, Oahu 'elepaio, orca,'O 'u, palila, Pitcher's thistle, Po'ouli, Puaiohi, Quino checkerspot butterfly, Sacramento orcutt grass, San Joaquin Valley orcutt grass, Shivwitz milk-vetch, short-tailed Albatross, slender orcutt grass, soft-leaved Indian paintbrush, Solano grass, Spalding's catchfly, sperm whale, steelhead trout, Steller sea-lion, vernal pool fairy shrimp, vernal pool tadpole shrimp, water Howellia, white abalone, whooping crane. Recovery plans can be found at: http://www.fws.gov/endangered/species/recovery-plans.html.

[17] U.S. Energy Information Administration, Analysis of the Impacts of the Clean Power Plan 16 (May 2015) ("Projected coal plant retirements over the 2014-40 period, which are 40GW in the AEO2015 Reference case (most before 2017), increase to 90 GW (nearly all by 2020) in the Base Policy case (CPP).").

[18] *Compare* IPM System Summary Report, Base Case (EPA-HQ-OAR-2013-0602-0223) *with* IPM System Summary Report, Option 1 State (EPA-HQ-OAR-2013-0602-0227). In all scenarios, EPA expects power sector coal use to decline. *See* Summary of IPM Analysis of Individual Building Blocks for 111(d) (EPA-HQ-OAR-2013-0602-0471).

One power plant that is likely to retire at least some of its coal-powered generating units due to EPA's rule is Big Bend Power Station near Tampa, Florida.[19] Big Bend has been designated as a primary warm-water manatee refuge,[20] is surrounded by a manatee sanctuary,[21] and has a manatee protection plan appended to its National Pollutant Discharge Elimination System ("NPDES") permit.[22] Generation at the Crystal River Plant, another coal-fired power plant in Florida that has been designated as a manatee refuge[23] and has a manatee protection plan appended to its NPDES permit,[24] may also be disrupted by the rule.

Clearly, power plants like Big Bend and Crystal River are critical to the survival of the manatee. The FWS's own Manatee Recovery Plan repeatedly stresses the importance of the warm-water refuges created by the plants. In fact, one of the primary objectives of the Service's Manatee Recovery Plan is to "protect . . . manatee habitats," including "industrial warm-water refuges."[25] FWS also estimates that almost two-thirds of manatees rely on power plants when the water temperature plunges.[26] Without a warm-water refuge, manatees that are subjected to cold experience "skin lesions, fat depletion, internal abscesses, gastrointestinal disorders, constipation and secondary infections" and death.[27]

A regulation that causes designated manatee refuges like Big Bend or Crystal River to shut down or alter their operations would significantly and adversely affect the endangered manatee.[28]

---

[19] Sean Cockerham, *Do it for the manatees, GOP lawmaker says of protecting coal plants*, MCCLATCHY DC, Mar. 19, 2015 ("Tampa Electric spokeswoman Cherie Jacobs said the four units at the Big Bend Power Station, a major attraction for manatees and tourists, are currently expected to last from between 2035 and 2050. But the proposed new carbon pollution rule could result in 'one or more units' closed in 2025 instead, she said.").

[20] U.S. Fish and Wildlife Service, Florida Manatee Recovery Plan 16-17 (2001), http://www.fws.gov/northflorida/Manatee/Recovery%20Plan/2001_FWS_Florida_Manatee_Recovery_Plan.pdf.

[21] 50 C.F.R. § 17.108.

[22] Big Bend Power Station, NPDES Permit No. FL0000817 ("The Permittee shall continue compliance with the facility's Manatee Protection Plan approved by the Department on August 6, 2003, and as amended thereafter.").

[23] Florida Manatee Recovery Plan, *supra* note 20, at 16-17.

[24] Crystal River Plant, NPDES Permit No. FL0000159 and FL0036366.

[25] Florida Manatee Recovery Plan, *supra* note 20, at 83-84.

[26] *Id.* at 28.

[27] Florida Fish and Wildlife Conservation Commission, Florida Manatee Cold-related Unusual Mortality Event, January-April 2010, Final Report iii (Apr. 19, 2011), http://myfwc.com/media/1536184/2010_Manatee_Cold_related_UME_Final.pdf.

[28] Other likely effects of EPA's power plant rules, including increased renewable energy generation, may also affect ESA-protected species. For example, FWS cites an article showing that for every megawatt of energy generated by wind turbines in the United States and Canada, 11.6 bats will die annually. Fish and Wildlife Service, Indiana Bat Fatalities at Wind Energy Facilities (2014), http://www.fws.gov/midwest/wind/wildlifeimpacts/inbafatalities.html (citing Paul M. Cryan, *Wind Turbines as Landscape Impediments to the Migratory Connectivity of Bats*, 41 ENVTL. L. 355, 364 (2011)).

We are astounded that EPA omitted any reference to the ESA or the section 7 consultation requirement in the proposed rule for new power plants.[29] It is unclear why EPA would consider the impacts of one rule on listed species and conclude there were "positive" effects from GHG reductions, but decline to consider the effects of the companion rule, which will also reduce GHG emissions.[30]

In order for the Committees to better understand EPA's determination that section 7 consultation was unnecessary for the proposed rule for existing power plants, as well as the decision not to include any ESA analysis in the proposed rule for new power plants, please provide the following documents and information by Monday, June 22, 2015:

1) If the likely effects of EPA's action on ESA-listed species or habitat will be "positive," would those "positive" effects be best described as "wholly beneficial," "insignificant," "discountable," or "no effect?" Please explain your answer in detail.

2) If the likely effects of EPA's action on ESA-listed species or habitat will be "remote" or "very small," would those effects be best described as "wholly beneficial," "insignificant," "discountable," or "no effect?" Please explain your answer in detail.

3) All records, documents, analyses, memoranda, and communications concerning the effects of the proposed rule for existing power plants on ESA-listed species or habitat, including EPA's consideration of its ESA obligations with regard to this rule.

4) All records, documents, analyses, memoranda, and communications concerning the effects of the proposed rule for new power plants on ESA-listed species or habitat, including EPA's consideration of its ESA obligations with regard to this rule.

5) All documents reflecting communications involving the Department of the Interior, including the FWS, concerning the applicability of the ESA and/or section 7 consultation

---

[29] Standards of Performance for Greenhouse Gas Emissions From New Stationary Sources: Electric Utility Generating Units, *supra* note 2. *Compare* 79 Fed. Reg. 34,830, 34,832 (including "Endangered Species Act" in list of "Impacts of the Proposed Action"), *with* 79 Fed. Reg. 1430, 1432 (omitting "Endangered Species Act" in list of "Impacts of the Proposed Action").

[30] This is not the first inconsistent position EPA has taken on the consultation requirements for power plant rules. Just last year, EPA concluded consultation with the Services on its Cooling Water Intake Structure ("CWIS") rule, another wide-ranging regulation affecting power plants. The resulting programmatic Biological Opinion ("BiOp") issued by FWS and NMFS specifically contemplated effects on endangered species, including the manatee. It also analyzed the impacts of thermal discharges. The very existence of this BiOp confirms that changes to power plant operations have effects on ESA-protected species that merit consultation under section 7 – a fact that EPA now seems to deny.

for the proposed rules for new or existing power plants.

6) All documents reflecting communications involving the Council for Environmental Quality concerning the applicability of the ESA and/or section 7 consultation for the proposed rules for new or existing power plants.

Instructions and definitions for responding to this request are enclosed. Please have your staff contact Rob Gordon or Jessica Conrad with the House Committee on Natural Resources at (202) 225-7107, or Byron Brown with the Senate Committee on Environment and Public Works at (202) 224-6167 with any questions.

Sincerely,

Rob Bishop
Chairman
House Committee on Natural Resources

James M. Inhofe
Chairman
Senate Committee on Environment and Public Works

cc: Raúl Grijalva, Ranking Member, Committee on Natural Resources

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 13 2015

OFFICE OF
AIR AND RADIATION

The Honorable James M. Inhofe
Chairman
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for your letter of June 15, 2015, to U.S. Environmental Protection Agency Administrator Gina McCarthy regarding the EPA's proposed greenhouse gas regulations for new and existing fossil fuel-fired power plants and consultation under the Endangered Species Act (ESA). The Administrator has asked that I respond on her behalf.

Any rule the agency finalizes in response to those proposals will be based on sound science, will be legally sound, will comply with the ESA, and will also address any comments we receive on the ESA. The EPA recognizes the importance of following all applicable laws and statutes, and assuring environmental regulations are developed to facilitate maintenance of a reliable, affordable energy portfolio and a diverse mix of fuels in providing the nation's electricity, while also ensuring the protection of human health and the environment. Coal-fired power plants are the largest contributor to U.S. greenhouse gas emissions, and climate change poses a serious threat to human health and the environment, including wildlife. The EPA's proposal would ensure that progress toward a cleaner, safer and more modern power sector continues through the deployment of the same types of modern technologies and steps that power companies are already using.

As you are aware, in the Clean Power Plan proposal, the EPA proposed to determine that this proposed rule (if promulgated) would not have effects on listed species that would trigger the section 7(a)(2) consultation requirement. 79 Fed. Reg. 34,830, 34,933-34 (June 18, 2014). At this point, the EPA has not finalized this determination or taken any final action in connection with this proposal or with the proposed rule for new power plants. The EPA would finalize its consideration of ESA requirements in connection with the issuance of any final rules and in that context would address any comments raising ESA issues.

Because EPA has not finalized its determinations regarding ESA requirements, it would be premature at this point for the agency to address in detail any hypothetical questions regarding the ESA in connection with any potential final rules. In response to your first question, however, we should point out that EPA's statement in the preamble to the proposed rule for existing

facilities that the projected environmental effects of the rule would be positive – *i.e.*, that emissions of GHGs and other pollutants would be reduced – was not intended to address effects of the rule on listed species or designated critical habitat for purposes of assessing ESA section 7(a)(2) requirements and did not constitute any finding of effects for that purpose. Rather, EPA was noting that as an overall matter, the rule (if promulgated) would have a net positive environmental effect by virtue of reducing emissions of certain air pollutants. Such an overall effect on the national and global environment does not, however, necessarily translate into an effect on any listed species in its habitat for section 7(a)(2) purposes.

As the climate changes, species will need to either adapt to the new local climate or migrate to stay within their preferred climate zone. The National Research Council stated that some species will be at risk of extinction, particularly those whose migration potential is limited whether because they live on mountaintops or fragmented habitats with barriers to movement, or because climatic conditions are changing more rapidly than the species can move or adapt. Likewise, the 2014 National Climate Assessment found that currently prevalent species may disappear from certain areas due to rapidly changing habitats caused by climate change and other stressors.

With regard to the ESA, EPA specifically described in the preamble the Department of the Interior's (DOI) view that the best scientific data available (a relevant data standard for ESA purposes) are insufficient to draw a causal connection between GHG emissions and effects on listed species in their habitats. DOI has thus been clear that where the effect is climate change, actions involving GHG emissions cannot pass the "may affect" test of the section 7 regulations. For section 7 purposes, therefore, such GHG-related actions would have no effect on listed species and are not subject to ESA consultation.

As described in the preamble, EPA has also supplemented DOI's analysis with the agency's own consideration of GHG modeling tools and data regarding listed species. As EPA explained, in the context of a separate rule involving GHG emission standards for light duty vehicles, EPA examined the GHG emission reductions achieved by that rule and concluded that available modeling tools cannot link the calculated small, time-attenuated changes in global metrics to effects on specific listed species in their particular habitats. EPA concluded that any potential for effects would thus be too remote to call for section 7 consultation. In response to your second question, EPA notes that this analysis did not conclude that there would be any "likely effects" of any character (whether "remote" or "very small") on listed species or designated critical habitat. Rather, EPA concluded that in light of the available data, any possibility for effect would be too remote to trigger section 7 consultation requirements. Notably, EPA's analysis involved the entire sector of light duty vehicles – not merely a single source of GHG emissions – and a quantity of GHG emission reductions substantially larger than that at issue in the proposed power plant rules. EPA's analytical conclusions are thus readily transferable to the current context and both supplement, and are entirely consistent with, DOI's assessment regarding ESA requirements described above.[1]

---

[1] As described in the preamble to the proposed rule for existing power plants, EPA also considered reductions in non-GHG air emissions that would be achieved by the rule, if promulgated. As explained in the preamble, EPA lacks relevant discretion under section 111 of the Clean Air Act to adjust the standard based on potential impacts of such pollutants on listed species. Under longstanding ESA regulations and precedent, section 7 consultation is thus not required with regard to such emissions.

As EPA explained in the preamble, the precise steps taken to implement any final rule are at this point uncertain and cannot be determined or ordered by the rule. EPA cannot predict with reasonable certainty where specific implementation measures would take effect or which measures would be adopted. It is thus uncertain how a future implementation plan for a particular state, such as Florida, might affect, if at all, the operations of a specific existing facility, such as the Big Bend Power Station and the Crystal River Plant. EPA notes that section 7(a)(2) of the ESA does not provide for such speculation. Rather, effects must be reasonably certain to occur to qualify for ESA purposes.[4]

Again, thank you for your interest in these important rulemaking. If you have further questions, please contact me, or your staff may contact Tom Dickerson in my office at dickerson.tom@epa.gov or (202) 564-3638.

Sincerely,

Janet G. McCabe
Acting Assistant Administrator

[4] Your letter states that EPA did not address ESA considerations in the preamble to the proposed rule for new power plants. If EPA promulgates that rule, the agency would address the ESA (and any comments received regarding the ESA) in that context. EPA notes that in the proposal for new power plants, EPA indicated that the proposal was unlikely to have significant impacts of any type because "available data indicate that, even in the absence of this rule, existing and anticipated economic conditions will lead electricity generators to choose new generation technologies that would meet the proposed standard without installation of additional controls". 79 Fed. Reg. 1430, 1495 (January 8, 2014)."

THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

JUL 10 2015

The Honorable James Inhofe
Chairman
Committee on Environment and Public Works
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

I am pleased to support the charter of the Environmental Laboratory Advisory Board in accordance with the provisions of the Federal Advisory Committee Act, 5 U.S.C. App. 2. The Environmental Laboratory Advisory Board is in the public interest and supports the U.S. Environmental Protection Agency in performing its duties and responsibilities.

I am filing the enclosed charter with the Library of Congress. The Environmental Laboratory Advisory Board will be in effect for two years from the date it is filed with Congress. After two years, the charter may be renewed as authorized in accordance with Section 14 of FACA (5 U.S.C. App. 2 § 14).

If you have any questions or require additional information, please contact me or your staff may contact Christina Moody in EPA's Office of Congressional and Intergovernmental Relations at moody.christina@epa.gov or (202) 564-0260.

Sincerely,

Gina McCarthy

Enclosure